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REPORTS OF CASES *June 14*
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

FOR THE
MIDDLE DIVISION
DECEMBER TERM, 1908,
AND
DECEMBER TERM, 1909.

WESTERN DIVISION
APRIL TERM, 1909.

EASTERN DIVISION
SEPTEMBER TERM, 1909.

CHARLES T. CATES, JR.
ATTORNEY-GENERAL AND REPORTER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1908.

**NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COM-
PANY v. BOARD OF EQUALIZATION FOR ASSESSMENT
OF RAILROAD PROPERTY.**

(Nashville. December Term, 1908.¹)

- 1. TAXATION.** Of railroad property as "distributable property" and as "localized property" under Acts 1897, ch. 5.

The statute (Acts 1897, ch. 5), requiring (in sec. 2) railroads to file schedules setting forth the length in miles of its entire roadbed, switches, and side tracks, showing the number of miles in this State, in each county and in each incorporated town in this State, and the value of the whole, and providing (in sec. 6) that the road (meaning the roadbed) of any rail-

¹ The opinion in this case, as well as that in the following case, was delivered in July, 1909, at an adjourned term as a continuation of the December Term, 1908.—**REPORTER.**

 Railroad v. Board.

road shall include all side tracks, switches, etc., and (in sec. 7) providing that the roadbed, rolling stock, franchises, choses in action, and personal property having no actual *situs* shall be known as "distributable property," and shall be valued separately from the other property, and providing (in sec. 8) that the depot buildings and other property—real, personal and mixed—having an actual *situs* shall be known as the "localized property," and shall be valued separately accordingly as the same may be located in any of the counties or incorporated towns in this State, divides the taxable railroad property into "distributable property" and "localized property"; and the side tracks, switch tracks, and industrial tracks off the main right of way, but used as a part of the general system, and for the same purposes as such tracks on the main right of way are used, must be assessed for taxation as "distributable property" within the meaning above given, and not as "localized trackage off the main right of way"; but all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards must be assessed as "localized property."

Acts cited and construed: Acts 1882 (ex. ses.), ch. 16, secs. 2-4; Acts 1897, ch. 5, secs. 2, 6-8.

Cases cited and approved: Franklin Co. v. Railroad, 12 Lea, 521; State Railroad Tax Cases, 92 U. S., 575; Railroad v. Wright, 151 U. S., 470; Railroad v. Backus, 154 U. S., 421; Railroad v. King, 57 C. C. A., 278, 120 Fed., 614; Porter v. Railroad, 76 Ill., 561; Railroad v. People, 205 Ill., 296; Dubuque v. Railroad, 47 Iowa, 196; Pfaff v. Railroad, 108 Ind., 144; State, ex rel., v. Railroad, 135 Mo., 618; State, ex rel., v. Railroad, 162 Mo., 391; Railroad v. Miller, 67 Ark., 498; Railroad v. Lancaster Co., 15 Neb., 252; Red Willow Co. v. Railroad, 26 Neb., 660.

2. **SAME.** Same. Assessment of "distributable property" of a railroad as "localized trackage" is absolutely void, and no taxes can be collected thereon.

Where the side tracks, switch tracks, and industrial tracks off the main right of way of a railroad are separately and erroneously

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assessed as "localized trackage off the main right of way," whereas they should have been assessed as "distributable property" of the railroad under a statute (Acts 1897, ch. 5) providing for the assessment of railroad property, such separate assessment is absolutely void, and no tax can be collected on such assessment as for distributable property. (*Post*, pp. 13, 14, 41, 42.)

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County.
T. E. MATTHEWS, Judge.

CLAUDE WALLER, for plaintiff.

ATTORNEY-GENERAL CATES and JAMES C. BRADFORD,
for defendants.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

This cause is before the court on the cross-appeals of the Nashville, Chattanooga & St. Louis Railway Company and the board of equalization from a judgment of the circuit court of Davidson county quashing an assessment of certain alleged localized property of the railroad, on account of vagueness and indefiniteness in the description of the property assessed. The main controversy, however, presented on the record, is whether the property involved should have been assessed as localized or distributable property. The genesis of the controversy, as well as its progress and

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development, may be thus stated: On August 1, 1907, the railroad commission made the following order, to-wit:

The commission took up the petition of Mayor Frier-son and City Attorney Chamlee, of Chattanooga, in regard to the assessment of the yards and terminals of railroad companies as localized property, and, after considering the opinion of the attorney-general of the State in the case, the petition was granted.

The commission proceeded to the consideration of the method to be pursued in assessing the trackage of railroads off the main right of way as localized property, and decided to value and assess it as railroad track on a mileage basis, whereupon the following order was adopted:

"That every railroad company doing business in Tennessee be required to file a statement under oath on or before August 15, 1907, setting forth the number of miles of side track, switch track, and spur track owned by it in the State of Tennessee, exclusive of such track on the main right of way; the statement to show the number of miles of such track in each county and municipality through which the road runs, together with the value of same.

"It is further ordered that each and every railroad company owning terminal yards and switch yards, or switch yards, be required to file with with this commission as a part of its returns a blue print, or blue prints, showing the main line, side tracks and switches, and such terminal yards and switch yards."

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In pursuance of this order the following letter was addressed to the tax agent or other representative of each railroad company doing business in Tennessee, who has been heretofore designated to make out, swear to, and return the tax schedules to the comptroller of the State treasury for the use of the commission making the assessment of railroad property for the years 1907 and 1908:

"Dear Sir: The attorney-general of the State holds that, under the law, this commission must assess [as] localized property, all the side tracks, spur tracks, and switch tracks off the main right of way of all railroads in Tennessee. To secure the information necessary to complete the assessment, the commission has entered an order on its records, requiring returns to be made to the commission by all railroads in Tennessee, on or before August 15, 1907, under oath, giving the number of miles of such side track, spur track, and switch track belonging to each road in Tennessee that is off the main right of way, and to report the number of miles of such track in each county and municipality in Tennessee through which the road runs, with the value in each instance of such track, the report to be accompanied by a blue print, showing the main line and side tracks in all switch yards as terminal yards."

The schedules and blue prints were accordingly filed by the railroad authorities. The following assessment was then made of

 Railroad v. Board.

LOCALIZED TRACK OFF MAIN RIGHT OF WAY.

Value of localized track off main right of

way	\$331,155 50
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LOCALIZED TRACK APPORTIONED TO COUNTIES.

Localized track in Davidson county, 12.40

miles	\$169,634 00
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Localized track in Davidson county, 3.25

miles, being one-half the mileage of the

Louisville & Nashville Terminal Com-

pany	82,461 50
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Total localized track, Davidson county,

15.65 miles	\$252,095 50
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Total localized track, Rutherford county,

ty, 1.33 miles	2,660 00
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Total localized track, Bedford county, 0.07

miles	140 00
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Total localized track, Franklin county,

2.23 miles	4,460 00
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Total localized track, Marion county, 0.18

miles	360 00
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Total localized track, Hamilton county,

12.37 miles	71,440 00
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LOCALIZED TRACK APPORTIONED TO MUNICIPALITIES.

In Nashville, Nashville, Chattanooga & St.

Louis proper, 12.30 miles	\$169,434 00
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In Nashville, one-half interest in Louis-

ville & Nashville terminal, 3.25 miles ..	82,461 50
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Total localized track in Nashville, 15.55

miles	\$251,895 50
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Railroad v. Board.

Total localized track in Murfreesboro, 1.33 miles	2,660 00
Total localized track in Bell Buckle, 0.07 miles	140 00
Total localized track in Decherd, 0.25 miles	460 00
Total localized track in Chattanooga, 9.19 miles	65,080 00

CONCLUSIONS.

Value entire distributable property of this division (151.15 miles)	\$5,140,100 00
Value entire property in Tennessee	5,474,749 50
Less exemptions	\$ 1,000 00
Less localized track off main right of way	331,155 50
Less other localized property	889,594 00
Value remaining distributable property in Tennessee	4,233,000 00
Value distributable property per mile (124.50 miles)	34,000 00

After the work of the railroad commission had been completed, the petitioner filed its exception to the action of that body as to the assessment of all of its property, and specifically excepted to the assessment of "localized track off main right of way" in the following language:

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"The honorable railroad commission in making the assessments of the several divisions of the Nashville, Chattanooga & St. Louis Railway within the State of Tennessee has divided the said property in the following classes, to wit: (1) Localized property; (2) localized trackage; (3) distributable property. In the division known and designated as "localized trackage" it has undertaken to assess separately and distinctly from the road itself certain tracks, switches, ties, rails, and the superstructure thereon, together with the property upon which they are located, and has specifically assessed this company as follows on localized trackage:

On the main line—that is, the line running from Nashville to Chattanooga—it has assessed what is designated as local- ized trackage at the sum of	\$331,155 50
On the Western & Atlantic Division it has assessed localized trackage at the sum of	32,980 00
On the Middle Tennessee & Alabama Branch it has assessed localized track- age at the sum of.....	200 00
On the West Nashville Branch it has as- sessed localized trackage at the sum of	13,850 00
On the Centreville Branch it has assessed localized trackage at the sum of	17,025 00
On the Sequatchie Valley Branch it has as- sessed localized trackage at the sum of	30,875 00

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On the Tracy City Branch it has assessed localized trackage at the sum of	35,575 00
On the Columbia Branch it has assessed localized trackage at the sum of	3,940 00
On the McMinnville Branch it has assessed localized trackage at the sum of.....	6,225 00
On the Lebanon Branch it has assessed localized trackage at the sum of	600 00
On the Shelbyville Branch it has assessed localized trackage at the sum of.....	1,475 00
On the Paducah & Memphis Division it has assessed localized trackage at the sum of	7,775 00
On the Northwestern Division it has assessed localized trackage at the sum of	44,333 00

"All of said said localized trackage is property that is completely covered by tracks, switches, ties, rails, and the superstructure thereon, and is used, not in the performance of local business, but in the handling of the general business of the company on each of the said branches. Said trackage is used precisely for the same purposes and in the same manner as the trackage on the main right of way of each of the several divisions of the company's property. The honorable railroad commission has seen proper to class all trackage—including tracks, switches, ties, rails, and the superstructure thereon—located upon the right of way of each of said divisions as a part of the distributable property of said company, but has assessed all of said trackage off of said right of way as localized trackage.

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"It is respectfully submitted that there is nothing in the act under which this honorable railroad commission assesses the property in question which justifies it in assessing any of said tracks, switches, ties, rails, and superstructure thereon off of the right of way as localized property, but that under and by the express terms of the act—being chapter 5 of the Acts of 1897—said property is a part of the distributable property, and must be assessed as a whole in connection with each division. Said act provides that 'the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual *situs*, shall be known as distributable property and shall be valued separately from the other property.' And section 6 of said act provides that 'the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails, and superstructure of every kind.' All of said localized trackage as above assessed is a part of the distributable property of each of the several divisions that have been assessed, and the assessment of said side tracks, switches, bridges, ties, rails, and superstructure thereon as localized property is unauthorized and void.

"The Nashville, Chattanooga & St. Louis Railway, therefore, excepts to all of the assessments designated as 'localized trackage' because said assessments are wholly void and unauthorized by the act under which the honorable railroad commission is proceeding. For proof as to the character of said localized trackage, ref-

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erence is hereby made to the proof already on file before the honorable commission."

This exception was specifically overruled by the railroad commission.

When the railroad commission had finally completed its work and overruled the exceptions of the petitioner, the record reached the hands of the board of equalization in the manner designated by the statute, and before that body the exception to the assessment of localized trackage off main right of way was renewed, but was overruled by that board, viz.:

"In the matter of the assessment of side tracks, spur tracks, switch tracks, and yards outside the main right of way of the . . . Nashville, Chattanooga & St. Louis . . . (the same having been assessed and denominated as 'localized trackage' by the State tax assessors), the board heard the arguments of counsel and upon consideration thereof and the whole record did confirm the assessment, as localized property, of said side tracks, switch tracks, spur tracks, and yards as the same had been made by the railroad commission, acting *ex officio* as State tax assessors of railroad property."

The assessments made by the railroad commission of localized property and distributable property were also approved by the board of equalization and certified to the comptroller.

The assessments of "localized track off main right of way" were not certified to the comptroller, because of

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the fact that the Nashville, Chattanooga & St. Louis Railway filed in the circuit court of Davidson county a petition for *certiorari* and *supersedeas*.

The prayer of the petition is as follows:

"Premises considered, your petitioner prays that proper process issue making the above-named defendants parties hereto, and that a writ of *certiorari* issue against the defendants to produce into this honorable court the minutes, orders, proceedings, records, and proof, including all maps and other evidence as to the assessments of the property of the petitioner now on file with the board of equalization and in the hands of the defendant Malcolm R. Patterson, and that a writ of *supersedeas* issue to supersede the assessments by the said board of equalization of the side tracks, switch tracks, spur tracks, industrial tracks, and yards, outside of petitioner's main right of way, as localized property, and to restrain the certification of the same, but not to restrain or stay the certification of the remainder of the assessments made by the board of equalization of the petitioner's property, and that on final hearing the assessment of said side tracks, switch tracks, spur tracks, industrial tracks, and yards of your petitioner, situated outside of the petitioner's main right of way, as localized property, be declared to be illegal, null, and void, and that said assessment itself be declared to be illegal, null, and void, as not authorized by the act, chapter 5 of the Acts of 1897. Petitioner prays for such other and further general relief as the circumstances may require."

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It is said on behalf of the State that "localized trackage off the main right of way" does not simply embrace side tracks and spur tracks, but includes the real estate on which said side tracks and spur tracks are located. It is said the land and the said road tracks traversing it are the constituent elements of valuation, and are inappropriately designated "localized trackage." The insistence of the State is that the so-called localized trackage at Chattanooga and Nashville is shown to be several tracts of land, comprising many acres, upon which are built shops, roundhouses, and other buildings, and also railway tracks used for switching and parking cars and other incidental and convenient uses. The railroad commission ascertained the number of miles of railroad track on each lot, and in making the assessment considered the individual value of the land and the tracks. This is shown by the following extract from the brief of the railroad commission, which is filed as an exhibit to its answer, viz.:

"In assessing localized tracks, the commission has taken into consideration the value of the ground and the value of the superstructure. This makes a wide difference in the valuation placed upon the side tracks in the city and in the country, on account of the high valuation placed on city property as compared with country property."

It is to be noted in this connection that these several tracts, upon which were situated the railway side tracks, were not assessed under the head of localized

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property, as other real estate is assessed. In other words, if they were not assessed as localized trackage, they were not assessed at all.

The said properties are thus described in the answer and return of board of equalization:

**"LOCALIZED TRackage IN THE CITY OF CHATTANOOGA
AND HAMILTON COUNTY.**

"As hereinbefore adverted to, it was shown by proof taken by the board of assessors, under the controversy before said board between the municipal authorities of Chattanooga and petitioner, that petitioner was and is the owner of fourteen acres of land lying practically in the heart of the city of Chattanooga, and in control, under lease from the State of Georgia, of about ten acres adjoining the aforesaid fourteen-acre tract, which was used as the yards of the Nashville, Chattanooga & St. Louis Railway and of the Western & Atlantic Railroad, which yards were largely covered by tracks, some of which were used for switching purposes, but the major portion of which (particularly on the ten-acre tract) were used for storage purposes and for repairing cars, and that on the fourteen-acre tract was located a machine shop, a turntable, or uncovered roundhouse, bins for the storage of coal, a sandhouse, an office building, and perhaps some other structures."

Again the answer avers, on the subject of localized trackage in Nashville:

"Further, it will be seen by an inspection of Exhibit

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No. 10 hereto, in connection with Exhibit No. 12 hereto, that the five several tracts of land bounded in red as shown upon said Exhibit No. 10, all owned by petitioner and containing 25.80 acres, were reported by petitioner's engineer, Trabue, as having on them 12.07 miles of track, and that, in addition to this track there were three separate industrial tracks leading, one to the Cumberland Mill, another to the Model Mill, and the third to the National Fertilizer Works, aggregating .33 miles of track, and this, added to the 12.07 miles of track above referred to, aggregated 12.40 miles, which the board of assessors valued and assessed as 'localized trackage' belonging to petitioner in the city of Nashville.

"Further, it will be seen by an inspection of said Exhibit No. 10 hereto that there are six separate tracts of land designated on said map and bounded by yellow lines, which several tracts aggregate 28.66 acres, and are owned by the Louisville & Nashville Terminal Company, but leased to the petitioner and the Louisville & Nashville Railroad. As located upon these six separate tracts of land, petitioner's engineer, Trabue, reported 6.5 miles of track, and one-half this mileage, to wit, 3.25 miles, the board of assessors assessed against petitioner, without any further description of said six several tracts of land, and without showing upon which of said tracts said 3.25 miles of trackage were located.

"No map showing location of the 'localized trackage' assessed against petitioner on account of its Northwes-

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tern Division was furnished by petitioner, but an inspection of Exhibit No. 19 hereto shows that the 'localized track' assessed against petitioner on account of its Northwestern Division in the city of Nashville and in the county of Davidson aggregating 10.85 miles.

"Exhibit C to Trabue deposition, Exhibit No. 12 hereto, p. 5, shows that this 'localized track,' aggregating 10.85 miles, covers some 12 industrial tracks leading from petitioner's property to different manufacturing or other business establishments, and the shops belonging to petitioner's Northwestern Division upon the shop track. Petitioner's engineer reports 8.12 miles of track, but does not give the acreage of this tract."

As to the other properties, the answer further states:

"Respondents deny that the assessment or valuation of petitioner's property, assessed as aforesaid under the name or classification of 'localized trackage' was included either by the board of assessors or by your respondents in the assessment and valuation of petitioner's distributable property, and this is clearly shown in Exhibit No. 15 to this answer and return; and the respondents also deny that said localized property so assessed as 'localized trackage' ought to have been included within the assessment and valuation of petitioner's distributable property, because, as respondents aver, said property is 'localized property,' as defined by section 8 of chapter 5 of the Acts of 1897.

"Respondents also deny that the assessment of peti-

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tioner's localized property under the name and classification of 'localized trackage,' as hereinbefore shown, was or is void, and deny that the petitioner is entitled to have said assessment set aside and annulled, or that it is entitled to any of the relief prayed in its petition."

The answer further avers:

"After the board of assessors had called upon petitioner for a supplemental statement, said petitioner filed as Exhibit B to the 'deposition' of its engineer, Trabue (which Exhibit B is said Exhibit No. 11 to this answer and return), a copy of said map, Exhibit No. 2 hereto, and designated thereon in black lines what said Trabue called the right of way (200 feet in width) of the Nashville, Chattanooga & St. Louis Railway, and also a right of way of like width of the Western & Atlantic Railroad. Said Trabue also designated by red lines that part of said yards not included within the alleged rights of way of said petitioner and of the Western & Atlantic Railroad. An inspection of said Exhibit No. 11 hereto will show that petitioner's alleged right of way, as laid down by Trabue—which was done without other evidence of the existence or extent of said right of way than his simple declaration—was made to include, not only the Union Depot train shed, but a considerable part of petitioner's freight depot; and the right of way of the Western & Atlantic Railroad, as designated by said Trabue, in the same manner was made to include the principal part of the 10 acres leased by the petitioner from the State of Georgia, and which

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the proof shows was and is covered with tracks used principally for storage purposes.

**"LOCALIZED TRACKAGE IN NASHVILLE—CHATTANOOGA
DIVISION.**

"An examination of Exhibit A to Trabue's deposition (Exhibit No. 10 to this return and answer) will show that petitioner's engineer, Trabue, laid down and designated a right of way for petitioner two hundred feet in width bounded by black lines. However, there is no other evidence of the location or width of all this alleged right of way except the mere declaration of Mr. Trabue. But said right of way, as laid down on said map, said Exhibit No. 10 hereto, was made to include the principal part of petitioner's freight depot, its entire general office building, a considerable part of a number of wholesale warehouses, part of the Union Station, the baggage, mail, and express building, and perhaps some other structures, all 'localized property' in character and use."

An examination of the assessment actually made by the railroad commission will show that the value of the ground upon which the general office building of the company at Nashville was located, being in the right of way laid off by the engineer, was deducted and included in the class of distributable property assessed, and only the value of the buildings was assessed as localized property.

Another item is 5.58 acres between Cedar and Church streets in Nashville. In regard to this the assessment

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of the railroad commission finds .5 of an acre on the so-called right of way, which it values at \$3,000, and deducts it from the valuation of the whole. And so, also, the land, .97 acre, between Church and Broad streets, upon which is built the freight depot, being within the right of way delimited on the map, is deducted from localized property and thrown into distributable property, and only the value of the superstructure is assessed as localized property.

We have made this elaborate statement of the action of the railroad commission, approved by the State board of equalization, in order to intelligently present the questions of law arising on the record. It has already been stated that the complaint of the railroad presented in its petition for *certiorari* is directed to the "assessment of its side tracks, switch tracks, spur tracks, industrial tracks, and yards outside of its main right of way as localized property." The law governing the assessment of railroad property for taxation is chapter 5, p. 102, Acts 1897, and is entitled:

"An act to provide just and equitable laws for the assessment and collection of revenue for State, county and municipal purposes whereby revenue is collected from the assessment of railroad, telegraph and telephone properties in the State of Tennessee."

And sections 6, 7, and 8 of that act are as follows:

"Sec. 6. That the road of any railroad property shall include all said (side) tracks, switches, bridges trestles, ties, rails and superstructure of every kind.

. . .

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"Sec. 7. That the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual *situs*, shall be known as distributable property, and shall be valued separately from the other property; and after ascertaining the total value of such distributable property wherever situated, and after having deducted from this value \$1,000, said assessors shall divide the remainder by the number of miles of the entire length of the road, and the result shall be the value per mile of such distributable property for the purpose of taxation; and the value per mile of such distributable property shall be multiplied by the number of miles in this State, and the product thereof shall be the sum to be assessed against such property for State purposes; and the value per mile so ascertained shall be multiplied by the number of miles in each county or incorporated city, and the product shall be the amount to be assessed upon such property by said counties and incorporated towns respectively.

"Sec. 8. That the depot buildings and other property, real, personal and mixed, having an actual *situs*, shall be known as the localized property of such railroad, and shall be valued separately accordingly as the same may be located in any of the counties or incorporated towns in this State."

Now, it will be observed that by the terms of this act all railroad property for the purposes of taxation is divided into two classes, localized and distributable. There is no classification of "localized trackage off the

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main right of way." No such nomenclature appears anywhere in the act, yet the railroad commission assessed the property of this company under three heads: (1) Localized property; (2) distributable property; (3) localized trackage off the main right of way. Under this head the commission assessed for taxation, as localized property, every side track, every spur track, every switch track, every industrial track, located off the main right of way of the Nashville, Chattanooga & St. Louis Railway. In other words, the commission adopted the margin of the right of way as the line of cleavage, and all side tracks, spur tracks, and switch tracks inside this delimited line were assessed as distributable property, and all such tracks outside this arbitrary line were assessed as localized property. Section 7 of the act of 1897 provides: "That the roadbed, rolling stock, franchises, *choses* in action and personal property of a railroad property having no actual *situs* shall be known as distributable property and shall be valued separate from the other property," etc. Section 6 of the act of 1897 defines the roadbed of a railroad, viz.: "That the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails and superstructure of every kind." Section 8 of the act of 1897: "That the depot buildings and other property, real, personal and mixed, having an actual *situs*, shall be known as the localized property of said railroad," etc. It thus appears that by plain statutory definition the roadbed includes "all side tracks and switches," and the direction of the statute

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is that the roadbed shall be assessed as distributable property. Is there any authority under the statute for making another classification of side tracks and switches, outside of the main right of way, as localized property? The proof in the record is to the effect that these side tracks and switches are auxilliary to the main line and form a constituent and component part of the railway system. The terminal yards of a railroad are frequently a network of side tracks, switches, and turnouts; nor are they exclusively used for local business. They are used to facilitate the transportation of trains engaged in interstate, as well as intrastate, commerce. Yet, the railroad commission assessed these side tracks, switches, and spur tracks as localized property, regardless of their connection with the main line and the purposes of their construction. The proof is that these side tracks are used as part of a general system and for all purposes necessary in operating the railroad. According to the proof the side tracks and switch tracks located off the right of way are used for the same purposes as those that are located on the right of way. They are all operated indiscriminately as one system, and to transact the general business of the company. As to the industrial tracks, the proof is that all industries located on such industrial tracks are given the rates of the city, town, or station where they are located. Such industrial tracks are considered a part of the terminals of the company at that point, and no extra charges are made for delivering freight to such industries. It appears, further,

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that no extra charge is made for shipping from an industry on such a track to a foreign point. The roadbed and trackage of a railroad must be viewed as a unit for all purposes of taxation, except as otherwise directed by statute. The rationale of railroad assessment for taxation is nowhere more lucidly expounded than by the late Justice Cooper in *Franklin Co. v. N., C. & St. L. Railway*, decided in 1881, and reported in 12 Lea, 521. Judge Cooper stated:

“The property of a railroad company for purposes of taxation consists of its realty, its local personalty, its rolling stock, its *choses* in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit not confined to any one county in which it may be exercised. The principal part of the franchise is the right to charge for freight and passengers, the charge being limited with a prescribed or reasonable rate for carriage in the proportion of the distance of transportation. Obviously, after ascertaining the value of the entire franchise in the State as a unit, no more approximate or just division of this value can be made for the purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of track in the county to the entire length of road in the State. And this is what was done by the acts under consideration.”

Again the court says:

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"The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor *a fortiori* its ultimate cost after years of expenditure in repairs and improvements. *On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes.*"

Again he says:

"The assessable value for *taxation of a railroad track* can only be determined by looking to the *elements on which the financial condition of the company depends, its traffic as evidenced by the rolling stock and gross earnings, in connection with its capital stock.* No local estimate of the *fraction in one county of a railroad track* running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Again the court says:

"*No part of the mere roadway can be said to be more valuable than any other part, when considered as a track, for the exercise of the franchises of the company as a common carrier. It is, like the franchise itself, a unit for the purposes intended; these purposes being not merely the use of the road for the profit of the company, but its use for the benefit of the public.*"

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Again the court says:

"The *real estate of a railroad company* other than its roadway, and its personal property having a local *situs*, may stand upon a different footing, *for such property may be estimated and assessed like other similar property of the county, district, or ward where it is situated.*" (Italics ours.)

This opinion of Judge Cooper was quoted with commendatory language by the United States supreme court in two cases, namely: *Columbus Southern Railway v. Wright*, 151 U. S., 470, 14 Sup. Ct., 396, 38 L. Ed., 238, and *Pittsburg Railway Co. v. Backus*, 154 U. S., 421, 14 Sup. Ct., 1114, 38 L. Ed., 1031.

The leading idea advanced by Judge Cooper is that the franchise of a railroad is a unit, and the roadway itself depends for its value upon the traffic of the company, and not merely upon the land and cross-ties. It is true that "the side tracks and switch tracks off the main right of way" are wholly useless and valueless when dissociated from the main line. They are indissolubly connected with the main line, and one cannot be operated without the other. They are a unit in value and in operation, as is well said by counsel. Side tracks and switch tracks off the main right of way are as essential to the operation of the railroad as the side tracks and switches on the main right of way. The order of the railroad commission was that any side track, spur track, and switch, of whatsoever kind, "off the main right of way," regardless of its use, should

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be assessed as localized property. There is no provision in the act of 1897 which justifies such a classification. If the term "roadbed" includes all "side tracks," it includes a side track "off the main right of way" as well as one on the main right of way. The same may be said of switch tracks, trestles, and bridges. It is said, however, that the act of 1882 (Laws Ex. Sess. 1882, p. 20, c. 16), which first classified railroad property for purposes of taxation into localized and distributable properties, and under which the railroads were assessed, contained this provision:

"Sec. 4. Be it further enacted, that the depot buildings, yards, grounds and other property, real, personal and mixed, having an actual *situs*, shall be known as the localized property of such railroad, and shall be valued by the county assessors and city assessors of the several districts and wards in which such property is situated, in the same manner and upon the same principles that govern the assessment of similar property owned by individuals, and it shall be valued by said county assessors and city assessors in the respective counties, towns and cities in which it is located. The State shall be entitled to a tax upon all such localized property, the counties, towns and cities shall be entitled to a tax upon the value of all such localized property as is situated within their respective limits."

The words "yards and grounds," found in the section quoted from the act of 1882, are claimed to evince the intention of the legislature that switching yards

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with side tracks were intended to be classified as localized property. It will be noticed that in the act of 1882 the words "yards and grounds" are used in connection with depot buildings, and were probably intended to refer to depot yards. It is significant that no such construction as is now urged was ever placed on the act of 1882, and that for a period of twenty-five years no tax assessor ever assessed the side tracks or switch tracks "on or off" the right of way as localized property.

It is said in the brief of counsel for the railroad, viz.: "It is a part of the history of the assessment of railroad properties in the State of Tennessee that every board of State assessors from 1882 to 1907 assessed all tracks, including side tracks, spur tracks, and switch tracks, both 'on' and 'off' 'the main right of way,' as a part of the unit known as 'distributable property.' Such assessments were approved by every governor of the State during that period as a member of the board of examiners or equalization."

We are entirely satisfied with the correctness of this statement. But, whatever potency there may have been in the terms "yards and grounds," found in the assessment act of 1882, they were entirely omitted from the act of 1897, under which the present assessment was made. This is shown by a comparison of the two acts, viz.:

Section 4, Act of 1882.

That the depot buildings, yards, grounds and other

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property, real, personal and mixed, having an actual *situs*, shall be known as the localized property of such railroad, etc.

Section 8, Act of 1897.

That the depot buildings and other property, real, personal and mixed, having an actual *situs*, shall be known as the localized property of such railroad, etc.

This change in the phraseology of the law removes any ground for the contention that "yards and grounds" covered with tracks should be included under the head of localized property. The words "yards and grounds," having been expressly omitted from the act of 1897, cannot now be read into the latter act for the purpose of covering this feature of the assessment. The other features of the two acts are identical, as will appear from the following parallel columns:

Section 2, Act 1882.

That the roadbed of a railroad shall include all side tracks, switches, trestles, bridges and the ties, rails, fastenings and superstructure of every kind.

Section 6, Act of 1897.

That the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails and superstructure of every kind.

It will be observed that the only difference in these two sections is that the word "roadbed" was used in the act of 1882 where the word "road" was used in the act of 1897. Whether the change was intentional, or a mere inadvertence, is not material. It is conceded

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by counsel on both sides that this change was immaterial, and that the words "roadbed" and "road," employed in the two acts, mean substantially the same thing.

Section 3 of the act of 1882 and section 7 of the act of 1897 undertake to define what shall be "distributable property." These two sections are substantially identical in language, viz.:

Section 3, Act of 1882.

That the roadbed, rolling stock, franchises, *choses* in action and personal property of a railroad property having no actual *situs*, shall be known as its distributable property, and shall be valued by said assessors separate from the other property, etc.

Section 7, Act of 1897.

That the roadbed, rolling stock, franchises, *choses* in action and personal property of a railroad property having no actual *situs*, shall be known as distributable property and shall be valued separately from the other property, etc.

The term "roadbed," under both acts, included all side tracks and switch tracks, wherever situated, and, with the rolling stock, franchises, *choses* in action, and personal property of a railroad having no actual *situs*, must be assessed separately as distributable property. Again chapter 5, p. 102, of the Acts of 1897 (section 2) requires railroads to file with the State comptroller a schedule, among other things, "setting forth therein the length in miles of its entire roadbed, switches and

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side tracks, showing the number of miles lying in this State, in each county of this State, and in each incorporated town in this State, and the "value of the whole." The legislature would not have required a schedule showing the "value of the whole" of "its entire roadbed, switches and side tracks," if switches and side tracks "off the main right of way" were intended to be assessed separately and distinct from the switches and side tracks "on the main right of way."

The principle of assessing side tracks and switch tracks as distributable property, under chapter 5, Acts 1897, was distinctly recognized and enforced in the case of *Kansas City, Ft. Scott & Memphis Railroad v. King, Comptroller*, decided by the United States circuit court of appeals at Cincinnati, and reported in 120 Fed., 614, 57 C. C. A., 278. That was a Tennessee case, and involved the construction of the act of 1897, with which we are now dealing. This property was shown to cover a considerable acreage, and included about twenty miles of trackage in the city of Memphis. In its schedules the railroad company reported that two miles of this trackage was main line, and that the remainder consisted of side tracks and switches. In fact, the whole constituted the terminals of said company in the city of Memphis. The total mileage of the railroad returned for taxation consisted of 959 miles, of which the railroad company claimed that 675 miles were main line and the remainder side tracks and switches, including eighteen miles of side tracks and switches in Memphis.

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The total valuation placed on the distributable property of the entire line of road (959 miles, including main lines, side tracks, etc.) was about \$13,400,000. The commission divided this aggregate amount by the total mileage—both main and side lines—and in order to arrive at a fair and approximate assessment, the proof showing that the property in Memphis was worth at least \$250,000, the quotient of \$14,000 obtained by this method was, as unit of value, multiplied by the total mileage of all tracks in Memphis, resulting in an assessment of about \$250,000.

It was insisted on behalf of the railroad company that the total valuation should be divided by the 675 miles of main line, and that the quotient thus obtained should be multiplied by the two miles of main line, as claimed by it, in Memphis; the result being that the railroad claimed that it could only be assessed upon a valuation of about \$38,000 on property shown to be worth \$250,000. The assessment actually made was as follows:

The railroad commission of the State of Tennessee, acting *ex officio* as State tax assessors of railroad, telegraph, and telephone properties assessable for taxation in said State, after consideration of the distributable property of the above-named railroad, namely, its rolling stock, franchises, roadbed, side tracks, switches, bridges, trestles, ties, rails, and superstructures pertaining to said roadbed, and all other property of said road other than localized property, for the pur-

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pose of assessing the same for taxation, State, county, and municipal, for the years 1899 and 1900, find the terminals of said road to be Kansas City, Mo., and Memphis, Tenn., with 959.50 miles of entire main line, of which there is 21.16 miles of terminal line in Tennessee, and the number of miles as hereinafter set out in each county and municipality of said main line, and compute the value for assessment for taxation of the said distributable property of the said road, and do so value the same for taxation, State, county, and municipal, for the years 1899 and 1900, as hereinafter set out, to be apportioned, State, county, and municipal, as hereinafter set out, viz.:

Value of distributable property of entire

line of road, 959.50 miles	\$13,434,000
Less legal exemptions	1,000
Assessable balance in Tennessee	296,240
Assessable value per mile	14,000

APPORTIONMENT FOR TENNESSEE.

21.16 miles at \$14,000 per mile	\$296,240
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APPORTIONMENT FOR COUNTIES—SHELBY.

21.16 miles at \$14,000 per mile	\$296,240
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APPORTIONMENT FOR MUNICIPALITIES—MEMPHIS.

21.16 miles at \$14,000 per mile	\$296,240
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An examination of above assessment will show that the railroad commission assessed all the terminal

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tracks, side tracks, and switch tracks of said company in the city of Memphis as distributable property. The real controversy in the case was over the method adopted for valuing the distributable property. The company insisted it had only two or three miles of main line in Memphis, but on account of the side tracks and terminal tracks the commission estimated the main line as 18.18 miles in length. The court, speaking through Judge Day, said:

“The terminal property of the appellant is composed of a large number of tracks, a network in fact, used to make connections, and to afford storage room for cars, and the means of handling, receiving, and delivering freight and making connections—a situation which may be generally described as embracing the terminal facilities of this railroad at Memphis. It is insisted for the railroad company that only that small portion of some two miles connecting with other roads can be regarded as main line, and included in the ‘entire length of the road,’ for the purpose of tax distribution under the statute. It is claimed that in this way the statute is consistently carried into effect, and this company taxed by the method which prevails in assessing other railroads in the State. It appears that in assessing a railroad traversing the State, which it is claimed the complainant’s does, it has been the practice to find the ‘length of the road’ without including side tracks, and assess the distributable property by multiplying the value per mile by the number of miles in the

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State included in the length of the road as thus obtained. The practice of taxing distributable property by this mileage method is quite common, and is prescribed by statute in a number of States. This means of reaching the distributing value of railroad property for the purpose of taxation has met with approval in a number of supreme court decisions. They are collected in the opinion of Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S., 421, 14 Sup. Ct., 1114, 38 L. Ed., 1031."

It will be noticed that the property assessed in that case embraced the terminal facilities of the railroad at Memphis, with a network of tracks used for handling, receiving, and delivering freight, and making connections, and yet it was all assessed as distributable property. There was no insistence that those terminal tracks, side tracks, and switch tracks should be assessed as "localized property." The court then examined section 7, c. 5, Acts 1897, providing for the assessment of distributable property, and further wrote:

"Undoubtedly, wherever applicable, this rule must be followed, and in most cases it will work substantial justice; but, as was said by Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S., 421, 14 Sup. Ct., 1114, 38 L. Ed., 1031, the law does not require that the valuation of the property within the State shall be absolutely determined upon the mileage basis. In the case at hand, we cannot perceive any reason for calling the connecting part of these terminal tracks main line and the balance side tracks. We have a situation where the

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'length of the road' rule, as construed in practical application to the other roads differently situated, will not afford a means of reaching the value of the property of this company in Tennessee. To treat the two miles as main line, and as furnishing a number by which to multiply the total valuation, divided by the number of miles of main line of the whole road, will value this property at about \$39,000—a sum which the testimony discloses to be so far below its true value as to give an absurd preference to this property in taxing railroads in Tennessee. The situation was apparent to the assessors, as their report discloses. While the mileage rule was inapplicable, they were, nevertheless, authorized by the statute to value this and all other property of the company in Tennessee for taxation. This property was not to be valued as a distinct and separate entity, but was to be treated as a part of the system to which it belonged."

There are many authorities from other States to the effect that the side tracks and switch tracks of a railroad are part and parcel of the system, and must be assessed as such under statutes providing a method of valuing railroad property for taxation. In Illinois a statute provided that a State board should assess "the railroad track," and that the local tax assessors should assess all property not "upon the right of way," or not included in the term "railroad track." Section 42 of the revenue law (Hurd's Rev. St. 1908, c. 120) provided as follows:

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"Such right of way, including the superstructure of main, side or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town or village, and extending to the point where such track crosses the boundary line leaving such county, city, town or village."

The collector of McLean county, Ill., undertook to collect taxes on certain land in the city of Bloomington, and the objection urged by the railroad company was that the property was held by the railroad company for its right of way, and was embraced in a class of property denominated by the revenue law as "railroad track," and therefore not assessable by the local assessors. The court says, in speaking of section 42 above quoted:

"What was intended by the enactment of this section of the statute by the use of the words here employed, 'such right of way?' Were these words intended to mean merely the strip of land a certain number of feet wide, upon which the railroad company had constructed its main track, or did the framers of the section in-

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tend to embrace, not only the main line of the road, but all side tracks, turnouts, and switches which are connected with the main track, and which are in actual use by the railroad company as a common carrier?

“We can see no reason why the term ‘right of way’ should be confined to the land over which the main track of a railroad shall be constructed. The land upon which a side track, a switch, or a turnout is built and in actual use by the company in the business for which it was organized, for all practical purposes, is as much held for right of way, as is the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are, therefore, of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed, and upon what principle the land upon which the main track is laid can be held to be right of way, and the

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land over which a side track, switch, or a turnout passes can be termed something else, we are at a loss to understand." *Chicago & Alton Railroad Co. v. People, ex rel.*, 98 Ill., 356.

This case was reaffirmed by the supreme court of Illinois in the later case of *People, ex rel. City of Chicago, v. State Board of Equalization*, decided in 1903, and reported in 205 Ill., 296, 68 N. E., 943. The court said:

"The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock, or freight in a country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged, and the land upon which its side or second track and turnouts, and its station, machine shops, roundhouse, etc., stand, is as necessary to the successful operation of the road and as much a part of the right of way as the land upon which the main track is laid, and the value of each piece of its right of way must be determined by taking into consideration the value of the entire

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right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way."

In this case it was urged that such a construction would render the act unconstitutional. This was fully discussed, and the court discarded the idea that it was unconstitutional, and says:

"The method provided in said act for assessing 'railroad track' does not remove real estate used for railroad right of way from within the limits of one taxing body and place it within the limits of another taxing body, but merely establishes a method of valuing the proportionate share of each taxing body through which the road runs, in the right of way as a whole, which, as we have seen, is equitable and just, and that method of assessing railroad right of way has frequently been approved by the courts of this and other States, as well as in the supreme court of the United States." *Porter v. Rockford Railroad Co.* (76 Ill., 561), *supra*; *Law v. People*, 87 Ill., 385; *State Railroad Tax Cases*, 92 U. S., 575, 23 L. Ed., 663; *City of Dubuque v. C., D. & M. Railroad Co.*, 47 Iowa, 196.

The State of Indiana also has a statute like that of Illinois. In the case of *Pfaff, Auditor, v. Terre Haute & Indianapolis R. R. Co.*, 108 Ind., 144, 9 N. E., 93, the facts were that the railroad company owned tracts of land and certain parts of lots in the city of Indian-

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apolis, aggregating about twelve acres. Across these lots certain tracks were laid, used for switching purposes and for the purposes of a roundhouse. These lots were attempted to be assessed by the local tax assessors under a statute almost precisely similar to that of the State of Illinois. The Indiana court held that such lots were a part of the "right of way," or "railroad track," in the sense of the statute, and must be assessed as such. See, also, *State, ex rel., v. Hannibal R. R. Co.*, 135 Mo., 618, 37 S. W., 532, for the construction of the Missouri statute, and wherein the court, among other things, said:

"The tracks in a yard may properly be termed side tracks, and include the ground necessary for the convenient and safe movement of cars, and for loading and unloading them."

See, also, *State, ex rel., v. Chicago, Rock Island Railroad Co.*, 162 Mo., 391, 63 S. W., 495; *St. Louis, Iron Mountain, etc., Railroad Co. v. Miller Co.*, 67 Ark., 498, 55 S. W., 926; *Burlington Railroad Co. v. Lancaster Co.*, 15 Neb., 252, 18 N. W., 71; *Red Willow Co. v. Chicago Railroad Co.*, 26 Neb., 660, 42 N. W., 879. The cases already cited are sufficient to show how, under analogous statutes in other States, side tracks, switches, and turnouts are regarded in the assessment of the properties of a railroad system. The railroad is everywhere regarded as a unit, and the side tracks and switch tracks as a part of the unit, which are not separately assessed for taxation but are included in the system. In this State this matter is not left to construction; but

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the statute expressly declares that the roadbed shall include all side tracks, switches, etc., etc. We therefore hold that the circuit court was in error in holding that "side tracks off the main right of way" were properly assessed as localized property. They should have been assessed as distributable property.

It is insisted, however, on behalf of the State, that "even if all the property denominated 'localized property off main right of way' be insufficiently described, and even if it be not 'localized property' under chapter 5 of the Acts of 1897, still it is distributable property, and the State is entitled to its tax on said property."

The above contention of respondent is more particularly set out in their seventh assignment of error as follows:

"The court erred in not sustaining the sixth ground of defendant's motion to quash, to the effect that in any event petitioner is liable for the State tax upon the assessment of petitioner's property in controversy under the name of 'localized trackage,' because the record shows that the amount of said assessment was not included in the assessment of petitioner's 'distributable property,' and, if the same is not assessable as 'localized property,' then the valuation should have been added to the valuation of the distributable property, and so certified. In no event was petitioner entitled to escape the State tax upon the valuation of said property as made and assessed by the State board, and the *supersedeas* should have been modified, so as to allow said valuation to be certified for State tax."

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We are of opinion this contention is unsound. As we have held, this property belonged to the distributable class, which is assessed as a unit. There is no authority in the act of 1897 for the separate assessments of side tracks and switch tracks in any county, and then to add that assessment to the valuation of distributable property. The separate assessment of this property as "localized trackage off the main right of way" was absolutely void, and no tax can be collected on such an assessment as distributable property. It should have been included in the general assessment of all distributable property.

While we hold that this trackage and the roadbed on which it is situated must be assessed as distributable property, all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards at Nashville and at Chattanooga, or elsewhere, must be assessed as localized property, and the railroad company should return in its schedule a description of the real estate so far as it is occupied by such buildings. The circuit court quashed the assessment of localized trackage off the main right of way because of vagueness and indefiniteness of description of the property. In this action the court was correct; but he should have further adjudged said assessment void, for the reason that the property assessed as "localized trackage" should have been assessed as "distributable property."

The proper judgment will be entered here, and the costs will be certified to the comptroller for payment.

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JOSEPH H. ACKLEN v. JOHN THOMPSON.

(*Nashville*. December Term, 1908.)

1. **CONSTITUTIONAL LAW.** Title of act for protection of game, birds, and fish expresses but a single subject of legislation.

The title of an act, expressing as a subject of legislation the creation and establishment of a department of fish, game, and forestry, and the means and agencies for its maintenance in relation to the preservation, propagation, and protection of game animals, wild birds, and fish of the State of Tennessee, expresses but a single subject or purpose; and, for the better accomplishment of that purpose, means and agencies were to be provided for in the organization of the department therein named. All legislation germane to this single purpose or subject may be maintained, under our constitutional provision (art. 2, sec. 17) that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." (*Post*, pp. 49, 50.)

Acts cited and construed: Acts 1909, ch. 519.

Constitution cited and construed: Art. 2, sec. 17.

2. **GAME.** Title of game animals, wild birds, and fish is in the State for the public.

It is well settled that, without the aid of a statute, and as a part of the common law, the title of game animals, wild birds, and fish is in the State as trustee for the benefit of its citizens, and a statutory declaration to that effect is unnecessary. (*Post*, p. 51.)

Acts cited and construed: Acts 1909, ch. 519, sec. 1.

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- 3. CONSTITUTIONAL LAW.** Legislation qualifying owner's title to game, without any express indication of such purpose in the title of the act, is unconstitutional.

Where a statute, without anything in its caption or title indicating it, provides that, in every case of catching, taking, killing, or having in possession any game animal, wild bird, or fish, such possession shall imply the consent upon the part of the possessor that such title still continues in the State for the purpose of regulating and controlling the use and disposition of the same, is to that extent unconstitutional, because where such creatures lawfully pass into the possession of a citizen, the title thereto would thereupon vest in him; and conceding that his ownership and title may be qualified as attempted to be done in said act, still it cannot be done in an act whose caption or title does not specifically indicate such contemplated legislation. (*Post*, pp. 50-52.)

See headnote 9.

Acts cited and construed: Acts 1909, ch. 519, sec. 1.

Constitution cited and construed: Art. 2, sec. 17.

- 4. SAME. Same.** Caption providing for "preservation, propagation, and protection" does not authorize reservation of title in the State, as against an owner, for regulating their use and disposition.

A provision in the title of an act for the "preservation, propagation, and protection" of game animals, wild birds, and fish does authorize a provision in the body of an act for the reservation of the title thereto in the State for the purpose of regulating the use and disposition of the same, when lawfully acquired by the possessor by catching, taking, or killing. (*Post*, p. 52.)

Acts cited and construed: Acts 1909, ch. 519, sec. 1.

Constitution cited and construed: Art. 2, sec. 17.

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5. **SAME.** An act for protection of game, birds, and fish, and also for protection of forests, is unconstitutional as containing two distinct subjects.

A single act containing provisions for the protection of game animals, wild birds, and fish, and also for the preservation of the forests of the State, contains two distinct subjects of legislation, namely, the protection of game, birds, and fish, as one subject, and the preservation of the forests as another and different subject, and is, therefore, unconstitutional and void. (*Post*, pp. 52. 53.)

Acts cited and construed: Acts 1909, ch. 519, secs. 18 and 25.

Constitution cited and construed: Art. 2, sec. 17.

6. **SAME.** Same. An act for propagation of game, birds, and fish will not authorize legislation for preservation of forests, for the reason that game and birds propagate in the forests. The fact that game animals and wild birds live and propagate in the forests will not authorize legislation for the preservation of forests in an act for the preservation, propagation, and protection of game animals, wild birds, and fish. (*Post*, p. 53.)

Acts cited and construed: Acts 1909, ch. 519.

Constitution cited and construed: Art. 2, sec. 17.

7. **SAME.** Title restricted to protection of birds in Tennessee will not authorize legislation for protection of birds without the State.

Where the title of an act restricts legislation to the preservation, propagation, and protection of game animals, wild birds, and fish of the State of Tennessee, a provision in the body of the act that "No part of the plumage, skin, or body of any bird protected by this act shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the State," is not authorized by such title, because the having in possession for sale a bird captured or killed without the State can in no way tend to the accomplish-

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ment of the purpose declared in the title for the protection of birds in Tennessee. (*Post*, pp. 53, 54.)

Acts cited and construed: Acts 1909, ch. 519, sec. 2.

Constitution cited and construed: Art. 2, sec. 17.

8. **SAME.** Same. Title restricted to protection of game in Tennessee will not authorize legislation for protection of game elsewhere.

Such title restricting legislation to the protection of game animals in Tennessee does not authorize legislation prohibiting the sale of any game taken or killed elsewhere than in Tennessee. (*Post*, p. 54.)

Acts cited and construed: Acts 1909, ch. 519, sec. 11.

Constitution cited and construed: Art. 2, sec. 17.

9. **SAME.** Legislation prohibiting the sale here of game taken outside the State is unconstitutional, as in violation of the commerce clause of the federal constitution.

Legislation prohibiting the sale, in this State, of any game taken, captured, or killed outside of the State, operates as an unconstitutional interference with the owner's property, and in contravention of the commerce clause of the federal constitution (art. 1, sec. 8, cl. 3), where the title to such property was acquired in a sister State or foreign country, and the game was brought within this State for use or commerce. (*Post*, p. 54.)

Acts cited and construed: Acts 1909, ch. 519, secs. 2 and 11.

Constitution of the United States construed: Art. 1, sec. 8, cl. 3.

Case cited and approved: *People v. Buffalo Fish Co.*, 164 N. Y., 93.

10. **SAME.** An act embracing more than one subject, or a subject not expressed in the title, is unconstitutional.

In all our cases from *Cannon v. Mathes*, 8 Heisk., 504, down to *Malone v. Williams*, 118 Tenn., 437, where a statute, in one or more of its provisions, was found to be in contravention of the

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mandate of the constitution (art. 2, sec. 17) that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title," it has been held to be inoperative and of no effect. (*Post*, p. 55.)

Constitution cited and construed: Art. 2, sec. 17.

Cases cited and approved: *Cannon v. Mathes*, 8 Heisk., 504; *Malone v. Williams*, 118 Tenn., 437.

Cases cited and distinguished: *State v. Trew hitt*, 113 Tenn., 579.

11. **SAME.** Act legislating one out of office, and devolving the duties and emoluments upon another, is unconstitutional.

An act which legislates an officeholder out of office, and devolves the duties and emoluments thereof upon another, is, to that extent, unconstitutional and void. (*Post*, p. 55.)

Acts cited and construed: Acts 1909, ch. 519.

Case cited and approved: *Malone v. Williams*, 118 Tenn., 437.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

JOHN J. VERTREES and THOS. H. MALONE, JR., for complainant.

JOHN B. AUST and JORDAN STOKES, JR., for defendant.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This case involves the question of the constitutionality of chapter 519 of the session Acts of 1909. The purpose of this act is thus expressed in its caption:

"A bill to be entitled an Act creating, establishing, and providing the means and agencies for establishing and maintaining a department of the State of Tennessee to be known and styled a 'Department of Game, Fish, and Forestry;' providing for his compensation, giving him authority and power to appoint assistants in the several counties in the State, and providing for their compensation; providing for *ex officio* game wardens in the various civil districts of the various counties of the State, and relating to the preservation, propagation, and protection of game, animals, wild birds, and fish of the State of Tennessee; and providing penalties for violations of any of the provisions of this Act."

The first general legislative movement for the preservation of game in this State is found embodied in chapter 169 of the Acts of 1903. By this act, the legislature asserted the principle that the wild game of the State belonged to the people in their collective sovereign capacity, and enacted measures for its protection by fixing the seasons for its taking, and attaching penalties for a violation of its several provisions.

By chapter 455 of the Acts of 1905, a department was created to be known and styled "Department of Game, Fish, and Forestry," and among other provis-

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ions was one directing the appointment by the governor of a State warden, who was to serve as such for the term of eight years. Under the authority of this act, the complainant Acklen was duly appointed to this office.

By chapter 489 of the Acts of 1907, the right of ownership to the fish was asserted to be in the State, and the taking of fish from its public waters was regulated; and the duty of the enforcement of this statute was devolved on the State warden and his subordinate agencies. At the same session of the legislature, an act was passed, the same being chapter 397, by which a system of forestry laws was provided and the duty of executing the same was also imposed upon the department of game, fish, and forestry. This was followed by chapter 519 of the Acts of 1909, the title to which has been hereinbefore set out.

It must be confessed, in the outset, that the caption to this act is somewhat involved, and that it requires an analysis of its various provisions to ascertain its exact extent. Without setting out the process of such analysis, we think, it may be simplified so as to arrive at the meaning of the legislature in adopting it by the rejection of all unnecessary verbiage. Thus treating it, we think it may be read as follows:

"A bill to be entitled An act to create and establish for the State of Tennessee a department of fish, game, and forestry, and to provide means and agencies for its maintenance and relating to the preservation, propagation, and protection of game animals, wild birds and

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fish for the State of Tennessee, and providing penalties for violations of any of the provisions of the act."

Thus read, the title gives notice that its purpose was to cover legislation for the benefit of the game animals, fish, and wild birds of the State, yet the act which follows is directed alone, save in particulars—to be pointed out later—to the protection, preservation, etc., of game animals and birds, leaving the fish of the State to be protected under chapter 489 of the Acts of 1907.

Conceding the above to be a proper reading of the title to this act, the question arises, Does the act violate section 17 of article 2 of the State constitution, which provides that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title"?

So far as the title itself is concerned, we are satisfied it expresses but a single subject or purpose, and that for the better accomplishment of that purpose means and agencies were to be provided for in the organization of the department therein named. All legislation germane to this single purpose or subject, under this section of the constitution, can be maintained.

Is the contention of the counsel of the complainant that the act itself contains incongruous provisions, sound or not?

Section 1 of the act, after declaring that the title to all game animals, wild birds, and fish in the State of Tennessee, not held by private ownership, was in the State, and that "no right, title, interest, or property

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therein can be acquired or transferred, or possession thereof had or maintained," except as therein provided, then enacts that "no game animals, wild birds, or fish shall be caught, taken, or killed in any manner or at any time, or had in possession except the person so catching, taking, or killing, or having in possession, shall consent that the title to said game animals, wild birds, and fish shall be and remain in the State of Tennessee for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, or killing; and the catching, taking or having in possession of game animals, wild birds, or fish at any time or in any manner by any person shall be deemed a consent of said person that the title of the same shall be and remain in the State for the purpose of regulating the possession, use, and disposition of the game, and such possession shall be consent to such title in the State."

We understand it to be well settled in at least American jurisprudence that, without the aid of a statute, and as a part of the common law of this country, the title of game animals, birds, and fish is in the State as trustee for the benefit of its citizens. So it is that the first part of this section declaring such ownership to be in this State was unnecessary, yet the declaration there made cannot be held to affect the question in hand. But, as has been seen in the concluding paragraph, an advanced step is taken; in that it provides that in every case of catching, taking, killing, or having in possession any game animal, wild bird, or

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fish that such possession shall imply the consent upon the part of the possessor that such title still continues in the State for the purpose of regulating and controlling the use of the same. It would seem that where any of the creatures, for the protection of whom this statute was passed, had passed lawfully into the possession of a citizen, that the title to the same would thereupon be vested in him. And it would further seem, that if the property of the citizen thus lawfully acquired is to be qualified as is done in the concluding paragraph of this section, then this should have been specifically pointed out in the caption of the act. Not only is there a failure in this regard, but we are at a loss to understand how it is that the reservation of the title in the State for the purpose of regulating the use and disposition of game animals, fish, or wild birds lawfully acquired by the possessor can be said in any sense to promote their "preservation, propagation, and protection."

There is, however, a still more serious objection to this statute arising upon sections 18 and 25 thereof. By section 18, it is provided that the commissioner of game, fish, and forestry, together with his subordinates, shall enforce all laws in existence or to be thereafter enacted not only for the protection, preservation, and propagation of game, etc., but for "the preservation of the forests of this State, and to prosecute all persons who violate such law or laws," while by section 25 it is provided "that where the department of game, fish,

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and forestry has been furnished information of the violation of any game, fish, or forestry law," he "shall in person or by deputy proceed to the place where said offense is alleged to have been committed, and within said county summon and examine under oath witnesses to ascertain the fact if said law has been violated and cause said offenders to be punished."

We think it certain that in the face of the provision of the constitution set out above, a single act could not be passed containing provisions for the protection of game animals, fish, and birds, and the preservation of the forests of the State. The legislature, in the several statutes passed at different times, recognized the necessity of classifying these as several subjects and provided for them in distinct enactments.

This distinction, thus practically recognized by the legislature, we regard as eminently sound and its effect on legislation, so far as the constitutional provision with which we are now dealing is concerned, cannot be avoided by the very ingenious suggestion of counsel for defendant that as game animals and birds live and propagate in the forests, that legislation for their preservation might be legitimately passed under the title in question.

Further, it will be seen that the title restricts legislation to game animals, wild birds, and fish of the State of Tennessee, while section 2, among other things, provides that "no part of the plumage, skin, or body of any bird protected by this act shall be sold or had in pos-

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session for sale, irrespective of whether said bird was captured or killed within or without the State, except as expressly provided in this act." We are unable to see how it is that the having in possession for sale a bird captured or killed without the State can in any way tend to the accomplishment avowed in the title to this act.

Again, section 11 prohibits, except as authorized by section 16, the sale of any game "whether taken or killed in this State or not." There is nothing in the title which gives information that game killed elsewhere than in Tennessee was to be made the subject of legislation. Game killed beyond the confines of the State, and brought into the State, can have nothing whatever to do with the game which is in a state of nature within the State.

Not only is this legislation, so far as it affects the title of the possessor to game killed out of the State, a subject beyond the title of this act, but we think it is additionally objectionable, because, if applied, where game is brought from a foreign State into this State for the possessor's use it would unconstitutionally interfere with the possessor's natural and lawful control of his property, and it would be in contravention of the interstate commerce clause of the federal constitution in a case where the possessor had, in the course of his trade, acquired title in a foreign State, and brought the game within this State for use or commercial purposes. *The People v. The Buffalo Fish Co.*, 164 N. Y., 93.

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In view of these incongruous provisions, we are satisfied it cannot stand. In all our cases from *Cannon v. Mathes*, 8 Heisk., 504, down to *Malone v. Williams*, 118 Tenn., 437, where it has been found that a statute in any one or more of its provisions was in contravention of the clause of the constitution hereinbefore set out, it has been held to be inoperative and of no effect. We see no reason why a departure from the rules announced in these various cases should be excused, when their authority is invoked for the purpose of declaring the present act unconstitutional.

It may be said, in passing, that the case of the *State v. Trewhitt*, 113 Tenn., 579, did not involve the clause of the constitution with which we are now dealing, but one altogether distinct and independent of it. And this is clearly indicated by Mr. Justice Neil in *Malone v. Williams*, *supra*, who also delivered the opinion in the *Trewhitt Case*.

There is another objectionable feature to this act, in that it practically legislates out of office in the middle of his term the complainant, and devolved its duties and emoluments upon another. We think there is no avoiding the insistence of complainant that this legislation is in the face of the holding of this court in *Malone v. Williams*.

For these reasons, the decree of the chancellor, adjudging this act to be void for unconstitutionality, is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1909.

MEMPHIS STREET RAILWAY COMPANY *v.* CARRIE FLOOD.

(Jackson. April Term, 1908.¹)

1. JUSTICES OF THE PEACE. Sufficiency of cause of action in warrant.

The warrant issued by a justice of the peace in a civil action must contain some general and brief statement of the plaintiff's cause of action sufficient to give the defendant reasonable notice of the general nature and character of the demand he is called upon to answer, so that he may not be misled in preparing his defense. (*Post*, pp. 61-75, 78, 79.)

Code cited and construed: Secs. 5958, 5988 (S.); secs. 4921, 4951 (M. & V.); secs. 4146, 4176 (T. & S. and 1858).

Cases cited and approved: *Parris v. Brown*, 5 Yerg., 267; *Davis v. Parks*, 6 Yerg., 260; *Kirby v. Lee*, 8 Yerg., 438; *Pryor v. Hays*, 9 Yerg., 417; *Wood v. Hancock*, 4 Humph., 465, 467; *Manning v. Wells*, 9 Humph., 746, 749; *Odell v. Koppees*, 5 Heisk., 90; *Watkins v. Kittrell*, 3 Bax., 42; *Sale v. Eichberg*, 105 Tenn., 333; *Harrison v. McMillan*, 109 Tenn., 78.

¹ This case was determined at the April term, 1908, but was received too late to be published with the cases of that term. It is, therefore, published with the cases of the April term, 1909.—**REPORTER.**

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Cases cited, distinguished, and approved: *Bodenhamer v. Bodenhamer*, 6 *Humph.*, 264; *Large v. Dennis*, 5 *Sneed*, 596.

2. SAME. Same. Case in judgment of an insufficient warrant.

A justice's warrant requiring the defendant to appear and answer plaintiff "in a plea of damages under \$500" does not comply with the rule stated in the preceding headnote based upon the statute (*Shannon's Code*, sec. 5958) and the decisions of the supreme court. (*Post*, pp. 61-75, 78, 79.)

See citations under the preceding headnote.

3. SAME. Same. Statute in Code provisions especially relating to justices prevails over other general provisions as to commencement of actions.

The statute (*Shannon's Code*, sec. 5958), prescribing the form of a justice's civil warrant and requiring some general statement of the nature and character of the demand sued on, is found in the chapter of the Code especially relating to proceedings before justices of the peace, and for that reason is controlling over the other general provisions of the Code as to the commencement of civil actions at law, where, by section 4522 of *Shannon's Code*, it is provided that a justice's civil warrant may be substantially the same as the form of the summons for the commencement of actions in the circuit court prescribed in section 4520 of *Shannon's Code*, which does not require the cause of action to be stated therein, but leaves it discretionary with the plaintiff or the officer issuing the same. (*Post*, pp. 73, 74.)

Code cited and construed: Secs. 4520, 4522, 5958 (*S.*); secs. 3520, 3522, 4921 (*M. & V.*); secs. 2815, 2817, 4146 (*T. & S.* and 1858).

4. SAME. Same. Failure to state a cause of action in the warrant is not cured by verdict for plaintiff.

The failure to state a cause of action in a justice's civil warrant will not be cured by a verdict for plaintiff in the circuit court. The verdict will cure defects in the declaration where the cause of action is imperfectly stated, or where the plea supplies the matter omitted from the declaration, but not where no cause of action is stated at all. (*Post*, p. 73.)

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Code cited and construed: Sec. 5958 (S.); sec. 4921 (M. & V.); sec. 4146 (T. & S. and 1858).

Cases cited and approved: Cannon v. Phillips, 2 Sneed, 185, 191; Odell v. Koppee, 5 Heisk., 88; Gas Co. v. Williams, 9 Heisk., 324; Read v. Gas Co., 9 Heisk., 550.

5. **SAME.** Same. Failure to state a cause of action in warrant is not cured by statute as to trials by consent where there has been no consent.

The statute (Shannon's Code, sec. 5931) providing that a case may be tried before a justice of the peace by consent of the parties, without a warrant, can have no application in a case where there was no such consent, so as to obviate or cure the defect in the warrant defective for its failure to state a sufficient cause of action as required by statute (Shannon's Code, sec. 5958). (*Post*, p. 74.)

Code cited and construed: Secs. 5931, 5958 (S.); secs. 4894, 4921 (M. & V.); secs. 4119, 4146 (T. & S. and 1858).

6. **SAME.** Same. Requirement that warrant shall briefly state the cause of action is not a mere technicality, but a substantial right.

The justice's warrant is intended not only as the original process to bring the defendant before the court, but also, at least to some extent, to take the place of a declaration. The requirement that the cause of action shall be briefly stated in the warrant is not a mere technicality, but an absolute necessity to prevent surprise and injustice. (*Post*, pp. 74, 75.)

7. **SAME.** Jurisdiction, dignity, and importance of their courts have been greatly increased and extended.

The jurisdiction of justices of the peace has been greatly increased and extended, and includes cases of very great importance, and their courts are of greater dignity and importance, and the public interest and rights of litigants require that their proceedings be conducted in better form and with more regularity and order than formerly, and the tendency of legislation and judicial decision is to bring this about rather than the contrary. (*Post*, pp. 75, 76.)

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8. SAME. Defects in warrant not cured by statute as to amendments.

The defect in a justice's warrant, defective for its failure to state briefly the cause of action or nature of the demand sued on, as required by statute (Shannon's Code, sec. 5958), is not cured by the statute (Shannon's Code, secs. 4583-4600), relating to the amendment of summonses or other proceedings in civil cases. The legislative intent expressed in said sections is that no process, pleading, or other proceeding shall be quashed for a formal defect, nor in certain cases for a matter of substance, where application to amend is seasonably made, and not to make a defective process or proceeding valid and effective for all purposes. (*Post*, p. 76.)

Code cited and construed: Secs. 4583-4600, 5958 (S.); secs. 3574-3591, 4921 (M. & V.); secs. 2863-2879, 4146 (T. & S. and 1858).

9. SAME. Defect in warrant is not cured by oral statement of the cause of action before the justice.

The defect in a justice's warrant, on account of its failure to state briefly the cause of action or the nature of the demand sued on, as required by statute (Shannon's Code, sec. 5958), was not cured by an oral statement of the cause of action made upon the trial before the justice. The proceedings before the justice cannot in any way affect the trial in the circuit court. (*Post*, pp. 62, 76.)

Code cited and construed: Sec. 5958 (S.); sec. 4921 (M. & V.); sec. 4146 (T. & S. and 1858).

10. SAME. Defect in warrant is not cured by oral statement of the cause of action in the circuit court.

The defect in a justice's warrant, because of its failure to state briefly the cause of action or the nature of the demand sued on, as required by statute (Shannon's Code, sec. 5958), was not cured by an oral statement of the cause of action made upon the trial in the circuit court upon an appeal from the justice of the peace. (*Post*, pp. 62, 76-78.)

Code cited and construed: Sec. 5958 (S.); sec. 4921 (M. & V.); sec. 4146 (T. & S. and 1858).

Case cited and distinguished: *Utley v. Railroad*, 106 Tenn., 246.

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11. **SAME.** Defect in justice's warrant is not waived by going to trial without motion to quash in circuit court.

The defect in a justice's warrant, because of its failure to contain a general statement of the cause of action or the nature of the demand sued on, as required by statute (Shannon's Code, sec. 5958), was not waived by going to trial in the circuit court upon appeal from the justice of the peace, without moving to quash the warrant. (*Post*, pp. 76, 77.)

Code cited and construed: Sec. 5958 (S.); sec. 4921 (M. & V.); sec. 4146 (T. & S. and 1858).

12. **ARREST OF JUDGMENT.** In circuit court for failure of justice's warrant to state briefly a cause of action.

Where a justice's warrant does not state a cause of action sufficient to give the defendant reasonable notice of what he is called upon to answer, it is void, and, after the trial, on appeal to the circuit court, and after the verdict for the plaintiff, in the absence of an amendment made at the proper time, or an application to amend, the defendant's motion made in arrest of judgment should be sustained, and the suit dismissed. (*Post*, pp. 63, 66, 70, 75, 78, 79.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court. H. W. LAUGHLIN, Judge.

T. R. WARING, JR., for Street Railway Company.

T. F. KELLY, for Flood.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

This in an action begun before a justice of the peace of Shelby county by Carrie Flood against the Memphis Street Railway Company. There was a trial before the justice of the peace and judgment in favor of the plaintiff, from which the defendant appealed to the circuit court of the county. The trial in that court resulted in a verdict for \$250 in favor of the plaintiff. The defendant moved for a new trial, and its motion was overruled. Thereupon it made a motion in arrest of judgment upon the ground that the warrant failed to state a cause of action, and was void upon its face. This motion was sustained and judgment entered dismissing the case, from which the plaintiff prosecuted an appeal in the nature of a writ of error to the court of civil appeals. That court reversed the judgment of the circuit court, and entered the judgment in favor of the plaintiff for \$250 and costs of suit. The case is now before this court to review and reverse the judgment of the latter court. The sole question presented is whether or not the trial judge was correct in sustaining the motion to arrest judgment.

The warrant of the plaintiff is in these words:

"State of Tennessee, Shelby County.

"To any lawful officer to execute and return. You are hereby commanded to summon The Memphis Street Railway Company, if to be found in your county, to appear before me or some other justice of the peace in

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and for said county, to answer Miss Carrie Flood in a plea of damages under \$500.00.

"Given under my hand and seal this 17th day of September, 1906.

"A. J. WILLIFORD, J. P."

It appears in the bill of exceptions that when the case was tried before the justice of the peace, under a rule of practice of his court, counsel for the plaintiff and the defendant, respectively, made oral statements of the facts constituting the plaintiff's claim for damages, being a personal injury claimed to have been sustained by her while a passenger upon one of the defendant's cars when the same collided with another car, and the defenses relied upon.

And it further likewise appears that when the case was called for trial in the circuit court, under a rule of that court, similar statements of the cause of action and defenses were made by counsel in all things, as was done upon the trial before the justice of the peace.

The contention of the plaintiff in error is that the warrant fails to state any cause of action upon its face, and is void, and that no valid judgment can be rendered upon it.

That of the defendant in error is that the warrant contains a sufficient statement of her cause of action; but, if it does not, then the defect complained of was cured by the oral statements made in the two courts, and that by these the plaintiff in error was given full notice of the claim sued upon.

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The first case decided by this court involving this question, called to our attention, is that of *Parris v. Brown*, 5 Yerg., 267. The warrant in that case issued to "summon James Brown to answer the complaint of Solomon C. Parris on a plea of trespass to his damage in a sum under twenty dollars." It did not state the nature of the trespass nor the property trespassed upon. The case was appealed to the circuit court, and there, after verdict in favor of the plaintiff, the defendant moved in arrest of judgment because the nature of the trespass and the property trespassed upon were not set out in the warrant, so that the defendant could know what he was charged with. The motion was sustained and the plaintiff appealed to this court. CATRON, C. J., delivering the opinion of the court, said:

"This being the creation of a new jurisdiction, and to be proceeded in summarily, everything necessary to give the defendant a proper knowledge of the charge against him must be stated, so that he may prepare himself for his defense. The cause of action is not properly set forth in this warrant. We think the circuit court decided correctly in arresting the judgment in this case, and are of the opinion that the judgment should be affirmed."

Afterwards, upon petition to rehear, the chief justice further said:

"This tribunal was authorized to imprison the person by force of its process; and yet it is insisted the face of the process need give the defendant whilst in the com-

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mon jail not the slightest notice why he is there, save that it is at the instance of the plaintiff. And this we are told was supposed necessary by the legislature, because of the illiterate and ignorant condition of the magistrates of the country. The very extensive jurisdiction conferred is a great contradiction of the assumed grounds of incapacity to state a plain fact. For instance, it is said this action in fact was brought for taking and carrying away the plaintiff's colt. Why was not the defendant told so? Suppose bail had been required; the warrant at first was for fifty dollars damages, and the circuit court caused it to be altered to twenty; the constable had put the defendant into the jail; he had called on his neighbors to bail him. Is it probable, if poor, he could have obtained it? The plaintiff, under this warrant, could have charged him with any cause of action not barred by time. The cause might for want of obtaining the evidence have been continued a month or more. Suppose he had applied for a writ of *habeas corpus* to a circuit court judge, who had called on the constable for the causes of caption and detention, detention in a common jail! and as the authority, this warrant had been produced as containing the cause of complaint; and authority to imprison, would any judge have supposed it sufficient? The truth must be that the act of 1829 was passed on the supposition of high intelligence on the part of the magistrates of the country, which, in many instances, in almost every country is true; and, as evidence of the fact, this most unguarded

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law has been executed with a degree of moderation and even-handed justice, so as to produce rarely a complaint of its rigor. Is it possible to believe that any man in the commission of the peace is so very ignorant as not to be capable of stating on the face of the warrant, not in set form, but in substance, plainly and briefly, that the defendant is summoned to answer the plaintiff of a plea of trespass for taking and carrying away his colt, or for killing his cow or his ox, or for throwing down his fence, or breaking open his house?

"It cannot be that this is requiring too much, when heretofore the courts had jurisdiction, and it was necessary to set forth in set form in a declaration the whole fact for which the warrant is a substitute; and, if the fact was not well alleged, the judgment was arrested, because no cause of action appeared on record. In such case the jury formerly found the defendant guilty in manner and form as the plaintiff had alleged against him; so in this cause, the jury found the defendant guilty of the trespass complained of, and assessed his damage to fifteen dollars. In giving judgment the court must refer to the cause of complaint. Here was none set forth, and no judgment could be given. It is anxiously urged the decision will do great harm, that many causes are depending on general warrants like the present, and that many judgments have been given on such warrants. The defective warrants will be amended if required, and the judgments are all valid, though erroneous."

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In *Davis v. Parks*, 6 Yerg., 260, where the warrant summoned "Parks and Campbell to appear and answer Elisha Davis in a plea of trespass on the case under fifty dollars," the judgment was arrested upon the ground that no cause of action was stated. It is there said:

"This case shows the necessity of requiring a substantial but brief description of the cause of action in cases brought before two justices."

In *Kirby v. Lee*, 8 Yerg., 438, the warrant in question was held to state a cause of action. The court there said:

"In proceedings before justices against millers, the statute gives an action of debt for the penalty, in which no further description of the offense is necessary in the warrant than to notify the defendant in a plain and sensible manner why he is sued, so that he may bring proof to defend himself. In these causes there is no pleading; the warrant is a mere notice to appear before the justice, and there go to trial *viva voce*, when the plaintiff must prove his cause of action, giving the justice jurisdiction and authorizing a recovery; but, if the warrant gives no notice of the cause of action, it will be quashed unless amended, because the plaintiff might have given in evidence, not that his grist was ground out of turn, but on account of goods sold, work and labor or any other matter; or before the justice one cause of action might be given in evidence, and if insufficient, and judgment went for the defendant, the

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plaintiff might appeal and in court set up a different demand, and recover the debt and all cost. Did the warrant, therefore, give notice to the defendant Lee of the cause of complaint, so that he might come prepared to make his defense? and, second, did it preclude the plaintiff from harassing the defendant with any cause of action he might elect to rely upon at the trial?"

While the warrant was held to state a cause of action in that case, the principle settled in that of *Parris v. Brown*, supra, was approved and followed:

In *Pryor v. Hays*, 9 Yerg., 417, the warrant commanded Pryor to "appear before some two justices of the peace for said county and answer the complaint of Mary Ann Hays in a plea of damages under fifty dollars, occasioned by beating and wounding her." It was held good upon the ground that the defendant was given notice of the cause and nature of the plaintiff's claim against him, and the case of *Parris v. Brown* was again approved.

In the case of *Wood v. Hancock*, 4 Humph., 465, the question was whether the proof offered was relevant to the cause of action stated in the warrant. This court said:

"In proceedings before justices of the peace, the strictness in pleading, which is required in courts of record, has never been enforced. All that we can expect or demand from these domestic tribunals is such reasonable precision and certainty in their proceedings as may be necessary for the attainment of justice.

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"It has often been held by this court that it is not necessary that the warrant should set out the cause of action with that particularity and precision which are required in the declaration in a court of record. Some general statement indicating the grounds of the action, so that the defendant may not be misled in preparing his defense, is all that is necessary. The warrant does not stand in lieu of a declaration. It is simply a summons to the defendants to appear and answer. The pleadings are *ore tenus*. And that which in a court of record may be done by proper pleading and proof may, as a general rule, be done before a justice of the peace by the production of the proof alone."

The case of *Manning v. Wells*, 9 Humph., 746, 51 Am. Dec., 688, also involved a question of variance. It is there said:

"In this warrant the defendant is required to answer on promises. But on the evidence the plaintiff seeks to make him liable for a tort. Although we do not hold justices of the peace to that technical strictness which is required in proceedings in courts of record, yet we have always held that they must give some general statement of the cause of action. Here the cause of action stated is repugnant to that proved. The evidence was therefore inapplicable to the action."

These cases were all decided before the Code was enacted in 1858, and at a time when there was no statute prescribing the form of a warrant in proceedings before justices of the peace. While it was held that the

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object and purpose of the warrant was to bring the defendant before the court to answer to suit of the plaintiff, and that the pleadings in the justice's court were *ore tenus*, yet in every case involving the question it was distinctly and consistently adjudged that the warrant must state the nature and cause of the plaintiff's complaint, so as to give the defendant notice of the general nature of the suit against him, that he might prepare his defense to the same. This is in accordance with sound principle. Indeed, when the question is considered for a moment, every one must be convinced that a summons which does not give the defendant notice of the demand which he is called upon to defend against, and the nature of which he cannot know until the plaintiff has introduced his proof, is practically no notice, and would often work great injustice.

The case of *Bodenhamer v. Bodenhamer*, 6 Humph., 264, is said to be in conflict with those above cited. The question there was not as to the sufficiency of the statement of the cause of action in the warrant, but that "the form of action was incorrectly stated." The court held, in substance, that, if the warrant gave notice of the nature of the claim sued upon, the form of the action, whether debt, assumpsit, or trespass, stated was immaterial. In other words, that forms of action as then recognized by common-law pleading did not obtain in proceedings before justices of the peace. This was all that was held in that case, and it is not to any extent in conflict with that of *Parris v. Brown*, and

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others following it. The case of *Large v. Dennis*, 5 Sneed, 596, is limited to the same point.

When the Code was enacted in the chapter relating to proceedings before justices of the peace in civil cases, a form for a civil warrant to be issued by a justice of the peace was prescribed. It is in these words:

"State of Tennessee, — County.

"To any lawful officer to execute and return:

"Summon A. B. to appear before me, or some other justice of the peace for said county, to answer C. D. in a civil action by note (or upon an account, or otherwise, as the case may be), under — dollars. This — day of —, 18—. E. F., Justice."

This form, it is evident from reading it, requires some general statement of the nature and character of the demand sued upon, and, instead of changing the practice outlined by judicial decision and in force previous to the Code, it enacted it into statutory law.

The first case which we have been able to find construing this section of the Code, is that of *Odell v. Koppee*, 5 Heisk., 90, and it is there held in accordance with previous decisions that the warrant must contain some statement of the cause of action sufficient to give the defendant notice of the character of the demand he is called upon to answer. The warrant in that case commanded the officer to summon the defendant to answer the plaintiff, "in an action of damages for a sum under \$250," practically the same as in the case at bar, and it was held that a motion in arrest of judgment would have been sustained if seasonably made. The court said:

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"Every intendment is to be made in favor of the validity and sufficiency of proceedings before a justice of the peace. Code of 1858, sec. 4176. But, while we cheerfully conform to this mandate of the legislature in favor of these domestic tribunals, still we must go no further than the law authorizes; nor should we violate the positive requirements of the Code in order to sustain them.

"The form of a warrant by a justice of the peace, as given by the Code of 1858, section 4146, is that it shall be in substance as follows: 'Summon A. B., etc., to answer C. D., in a civil action, by note, or upon open account, or otherwise, as the case may be, under — dollars.'

"Here it is plainly prescribed that the warrant is, in substance, to state briefly the cause of action. It has been held by this court, and we think correctly, that there must be some sufficient statement in the warrant to indicate the charge he is to answer. In the language of the court, in the case of *Wood v. Hancock*, 4 Humph., 467: 'Some general statement indicating the grounds of the action, so that the defendant may not be misled in preparing his defense.' See, also, 9 Humph., 749.

"In this warrant there is no statement at all of any 'cause of action,' but only a claim for damages, but for what cause is not stated. There is no compliance with even the most liberal construction of the law in favor of these proceedings."

The case of *Watkins v. Kittrell*, 3 Baxt., 42, involved

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a question of variance between the warrant and the proof, and it is there said :

“If the plaintiff might thus go into proof of this last transaction, he might as well have introduced proof of a dozen different causes of action, and thus without any notice to the defendant take his chances to recover upon any or all of them, at least to the extent of the magistrate’s jurisdiction. This, we think, would be in substance to recover, without any warrant at all, as to those causes not in any way referred to in the warrant, and we think it cannot be done.”

The necessity of a statement of the cause of action in the warrant, and that the proof offered by the plaintiff conform to that statement and be relevant to the issue there presented, is recognized in numerous decisions of this court. *Sale v. Eichberg*, 105 Tenn., 333, 59 S. W., 1020, 52 L. R. A., 894; *Harrison v. McMillan*, 109 Tenn., 78, 69 S. W., 973.

The last case involving the sufficiency of a warrant, and holding that where no cause of action is stated a motion in arrest of judgment will lie, is the unreported case of *Archer v. Railroad Co.*, in which the opinion was delivered by Mr. Justice Neil, at Jackson in 1904. The warrant required the defendant to appear and answer “in an action to his damage in the sum of fifty dollars.” This was held bad, and there decided, if properly made, a motion in arrest of judgment would have been sustained. The court said :

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"It is insisted that the failure to state a cause of action in the warrant was cured by the verdict.

"We do not think that this position is well taken. Shannon's Code, section 5958, gives the form of warrant before a justice of the peace, and this form requires the cause of action to be stated in the warrant. See the notes to that section in Shannon's Code. Also *Odell v. Koppee*, 5 Heisk., 88. The verdict will cure defects in the declaration where the cause of action is imperfectly stated, or where the plea supplies the matter omitted from the declaration (*Memphis Gayoso Gas Co. v. Williams*, 9 Heisk., 324; *Read v. Memphis Gayoso Gas Co.*, 9 Heisk., 550), but not where no cause of action is stated at all (*Cannon v. Phillips*, 2 Sneed, 185, 191)."

It is urged that the warrant in this case is in the form of the summons prescribed by the Code, section 2815 (Shannon's Code, section 4520), which is applicable to proceedings before justices of the peace (Code, section 2817; Shannon's Code, section 4522), and that this form does not require the cause of action to be stated in the summons, but leaves it discretionary with the plaintiff or the officer issuing the warrant. This section is found under the general provisions of the Code in relation to the commencement of actions, and is peculiarly applicable to actions begun in courts of record. So far as it applies to warrants issued by justices of the peace and authorizes the omission of a statement of the cause of action, it is in conflict with the form above quoted, prescribed by section 4146 of the

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Code of 1858 (Shannon's Code, section 5958), and we think the latter is controlling so far as such conflict exists, because it is to be found in the chapter especially relating to proceedings before justices of the peace, and is specific legislation prescribing and fixing the form of a warrant to be issued in civil cases.

The defendant in error also relies upon Code of 1858, section 4119 (Shannon's Code, section 5931), to the effect, that a case may be tried before a justice of the peace by the consent of the parties without a warrant. This can have no application in this case because there was no such consent.

Much stress in the brief of counsel for the defendant in error and in the opinion of the court of civil appeals is placed upon statements contained in some of the earlier cases herein quoted from, that the warrant is solely for the purpose of bringing the defendant into court, and that the pleadings before justices of the peace are *viva voce*. There is nothing in this. These cases were decided before the provisions of the Code prescribing the form of the warrant requiring the cause of action to be therein briefly stated, but in all of them it is distinctly held that the warrant must contain a sufficient statement of the nature of the action. It is therefore evident that, when it is said that the pleadings before the justice of the peace are oral, those subsequent to the warrant are referred to, and such has been the actual practice.

The form of the warrant prescribed by the Code, and

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the construction placed upon that provision by the subsequent cases construing it, show that it was intended not only as the original process to bring the defendant before the court, but also to, at least to some extent, take the place of a declaration.

We cannot agree with the argument of counsel that the requirement that the cause of action be briefly stated in the warrant is a mere technicality of which courts are now freeing their proceedings in order to reach the justice of controversies. That defendants may have notice of complaints made against them so that they may be able to prepare their defenses is of highest importance to them, and absolutely necessary to prevent surprise and injustice. The provisions of the law requiring such notice are anything but technical or formal in their character. It was held by this court long before the enactment of the Code, as appears from the cases from which we have quoted, that a warrant that did not state the cause of action sufficiently to give the defendant notice of the demand against him was void, and judgment upon the verdict in the circuit court would be arrested in such cases. Such has been the consistent holding of this court. When this rule was first announced, the jurisdiction of the justices of the peace in this State was of very small and insignificant matters. This jurisdiction has been increased and extended greatly since that date, and now includes cases of very great importance. Justices' courts are now of greater dignity and importance,

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and the public interest and rights of litigants require that their proceedings be conducted in better form and with more regularity and order, and the tendency of legislation and judicial decision is to bring this about rather than the contrary, as insisted by counsel for defendant in error.

The defect in the warrant is not cured by the provisions of Code, sections 2863-2879 (Shannon's Code, secs. 4583—4600). These provisions in the main relate to the amendment of summonses or other proceedings in civil cases. The legislative intent expressed in them is that no process, pleading, or other proceeding in the action shall be quashed for a formal defect, and in certain cases for those relating to matters of substance, where application to amend is seasonably made. There was no intention to make defective proceedings valid and effective for all purposes. This would amount to the abolition of all laws prescribing forms and rules of proceedings in courts for the purpose of securing orderly and correct administration of justice.

The contention of the defendant in error that the defect in the warrant was cured by the oral statement of the cause of action made upon the trial before the justice of the peace and in the circuit court is also untenable. The proceedings before the justice of the peace could not in any way affect the trial in the circuit court, and need not be further noticed.

The statement of counsel on the trial in the circuit court, however full and explicit of the cause of action,

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cannot be considered as amending the warrant. Amendments to legal proceedings cannot be made by oral statements. Nor did the defendant waive the defect by going to trial without making a motion to quash the warrant. It is well settled that in an original action brought in the circuit court, if the declaration fail to state a cause of action, the defendant after verdict may move in arrest of judgment, although he may have filed any number of pleas, provided the defect is not supplied by new matter pleaded by him. If the rule was otherwise, judgment could not be arrested in any case. This is evident from the mere statement of the proposition.

The defendant in error relies upon the case of *Utley v. Railroad Co.*, 106 Tenn., 246, 61 S. W., 84, to sustain her insistence that the oral statement of the cause of action cured the defects in the warrant. It does not do so. The question involved in that case was not one of pleading, but of evidence. The counsel for the plaintiff, at the instance of the trial judge, stated the grounds of the suit against the defendant, and the attorney for the latter stated the defense that would be relied upon in such manner as to admit the case made by the plaintiff. In other words, the defense was stated in the form of a plea of confession and avoidance. Acting upon the admission, the plaintiff did not fully prove his case, and, upon the conclusion of his evidence, the defendant demurred thereto. This court held that the defendant was bound by the admission, and that the demurrer should not have been sustained. Thus it

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will be seen that *Utley v. Railroad Co.* presented a question entirely different from that here involved. We are therefore of the opinion that under the long-settled practice of this State, established and consistently adhered to by judicial decision and in the provisions of the Code regulating the practice before justices of the peace, that a justice's warrant must contain a brief statement of the cause of action sufficient to give the defendant reasonable notice of what he is called upon to answer, and that, where the warrant fails to contain such statement, it is void, and upon the trial, on appeal to the circuit court of the State, in absence of an amendment made at the proper time, a motion made in arrest of judgment should be sustained and the suit dismissed.

The warrant of the defendant in error does not comply with this rule. It merely notifies the defendant therein to appear and answer the plaintiff "in a plea of damages under \$500." This does not give the defendant any information of the nature of the suit brought against it. It could as well be damages for breach of contract, a personal injury, or a trespass committed upon the personal or real property of the plaintiff. Under it evidence could be offered before the justice of the peace to support one cause of action, and in the circuit court on appeal to support another, and in neither court could the trial judge determine whether the proof offered was relevant to the real cause of action. It fails to state a cause of action and the judgment

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upon the verdict of the jury was properly arrested for that reason.

The plaintiff could have amended her warrant, but made no application to do so. The defendant was not called upon to point out the defect by motion to quash or otherwise. The parties were dealing at arms' length. There was no surprise, and no one was misled. The defendant had as much right to make the motion in arrest of judgment as it would have had in an original action begun in the circuit court in a case where it had pleaded to a defective declaration after verdict against it. There was no error in the judgment of the circuit court, and that of the court of civil appeals reversing it is erroneous, and must be reversed.

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MARY BORO v. DORA R. HIDEELL.

(*Jackson*. April Term, 1909.)

1. **STATUTES OF LIMITATIONS.** Nonresidence of defendant does not suspend their operation where complete relief may be had by suit with publication.

The statute (Shannon's Code, sec. 4455), suspending the operation of the statutes of limitations while the person against whom a right of action has accrued is absent from or resides out of this State, does not apply to a suit to set aside a deed of conveyance of land for fraud, because complainant may obtain full and complete relief in a suit by publication in lieu of personal service of process. (*Post*, pp. 86-96.)

Code cited and construed: Sec. 4455 (S.); sec. 3458 (M. & V.); sec. 2762b (T. & S.).

Acts cited and construed: Acts 1819, ch. 28, sec. 1; Acts 1865, ch. 10, sec. 3.

Cases cited and approved: *Taylor v. McGill*, 6 Lea, 294; *Turcott v. Railroad*, 101 Tenn., 104; *Green v. Snyder*, 114 Tenn., 100.

Cases cited as bearing upon the question, but not on this special phase of it: *Smart v. Waterhouse*, 10 Yerg., 94; *Yancy v. Yancy*, 5 Helsk., 353, 354; *Peak v. Buck*, 3 Bax., 71; *Morrow v. Morrow*, 3 Tenn. Chy., 532, 534; *Wright v. West*, 2 Lea, 78, 83, 84, 85; *Ridge v. Cowley*, 6 Lea, 167; *Carlin v. Wallace*, 13 Lea, 573; *Barbour v. Irwin*, 14 Lea, 720; *Kempe v. Rader*, 86 Tenn., 191; *Rose v. Wortham*, 95 Tenn., 505, 508, 509; *Nichols v. Loyd*, 111 Tenn., 145; *Maxey v. Powers*, 117 Tenn., 381, 403, 404; *Miller v. Wolfe*, 115 Tenn., 234; *Hamblen Co. v. Cain*, 115 Tenn., 279; *Wright v. Cunningham*, 115 Tenn., 445; *Hardin v. Hassell*, 118 Tenn., 143; *Ray v. Haag*, 1 Tenn. Chy. App., 249.

Case cited as overruled: *Carlin v. Wallace*, 13 Lea, 573.

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3. SAME. Fraudulent concealment of cause of action prevents their operation.

Where a cause of action is fraudulently concealed from the complainant, the statutes of limitations will not run until complainant discovers the fraud. (*Post*, pp. 96, 97.)

Cases cited and approved: *Shelby v. Shelby*, Cooke, 179; *Porter v. Cocke*, Peck, 30, 46; *Haywood v. Marsh*, 6 Yerg., 69; *Reeves v. Dougherty*, 7 Yerg., 232, 236, 237, 238; *Smart v. Waterhouse*, 10 Yerg., 105; *Nicholson v. Lauderdale*, 3 Humph., 200; *Haynie v. Hall*, 5 Humph., 290, 292; *McLain v. Ferrell*, 1 Swan, 48, 52; *Peak v. Buck*, 3 Bax., 71, 72; *Vance v. Mottley*, 92 Tenn., 310; *Woodfolk v. Marley*, 98 Tenn., 467, 471.

3. PRINCIPAL AND AGENT. Principal is affected with agent's knowledge about the particular matter, when.

Where complainant appointed her brother as her agent to obtain restitution of certain land of which she had been deprived by fraud, with the right and power to sue for said land, she was affected and bound by her said brother's knowledge of the fraudulent concealment of the cause of action from the date he discovered it. (*Post*, pp. 97, 98.)

Cases cited and approved: *Bank v. Campbell*, 4 Humph., 394; *Tagg v. Bank*, 9 Helsk., 479, 483, 484; *Rhat v. Mining Co.*, 5 Lea, 1, 63; *Bank v. Smith*, 110 Tenn., 337, 345.

Cases cited and distinguished: *Duke v. Harper*, 6 Yerg., 280, 284, 287; *Yarbrough v. Newell*, 10 Yerg., 376, 381, 382.

4. STATUTES OF LIMITATIONS. Right of action is barred in seven years after complainant's agent discovered fraudulent concealment of cause of action, when.

Where complainant appointed and employed her brother as her agent to obtain restitution of certain land which she had been induced to convey by fraudulent representations, and her said brother acquired knowledge of the fraud in 1890, complainant's right of action was barred at the expiration of seven years thereafter. (*Post*, pp. 97, 98, 99.)

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5. SAME. Vendor's concealment of cause of action will not prevent their operation in favor of a fraudulent vendee.

The concealment of a cause of action by the vendor, or one procuring a conveyance to be made to the conveyee, will not prevent the running of the statutes of limitations in favor of a fraudulent vendee. (*Post*, pp. 99, 100.)

Cases cited and approved: Porter v. Cocke, Peck, 30, 46; York v. Bright, 4 Humph., 312; Ramsey v. Quillen, 5 Lea, 184; Mulloy v. Paul, 2 Tenn. Chy., 155; Howell v. Thompson, 95 Tenn., 396, 404; Bates v. Preble, 151 U. S., 162.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
A. B. PITTMAN, Chancellor.

T. K. RIDDICK and FINLEY & FINLEY, for complainant.

WRIGHT & WRIGHT, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed to recover a half interest in forty-three acres of land lying on the Pigeon Roost road in Shelby county.

It is alleged, in substance, that the complainant was a niece of W. H. Hidell, the husband of the defendant Dora; that she had lived in the same house with him;

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that the greatest confidence and affection existed between them; that she became a nun, and before doing so, or shortly thereafter, intrusted all of her property rights to him; that on April 24, 1877, he procured from her a deed to the half interest in the forty-three acres on the statement that it was necessary that the property should be in his name in order that her interest might be better protected in certain litigation then pending, in which the property was involved, referred to in the present record as the "Woodward suit."

It is further alleged that several years thereafter—that is, in 1888—W. H. Hidell wrote to the complainant a letter, in which he asked that she sign a certain deed, which purported on its face to be a deed of gift, of the same half interest in the forty-three acres to his wife, the defendant, Dora R. Hidell; that upon her objecting that, under the rules of the religious association to which she belonged, she could not make a deed of gift of any of her property, he replied in a long letter of date May 10, 1889, in which he claimed and represented that she was indebted to him for a fee of \$200 paid to Mr. King, a lawyer at that time living in Memphis, for services in the litigation above referred to, and also that she was indebted to him in the sum of \$300 for services which he himself had performed as a lawyer in the litigation referred to; that he had paid a considerable amount of taxes on the property, and that he had collected practically nothing from the rents, and that the property was worth only about \$500; that the

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deed, while purporting on its face to be a deed of gift, in order to avoid the State tax on sales, was not really such, but was supported by the considerations just stated; that he desired it made to his wife as a graceful recognition of the assistance she had given him from her own estate in saving the property out of the litigation in which it had been involved; that, yielding to these representations, she executed the deed on June 17, 1889, and mailed it to the said W. H. Hidell, but that complainant did not discover their falsity, or that a fraud had been practiced upon her, until 1908, a few days before she filed her amended bill, the substance of which has been above detailed.

W. H. Hidell died in 1896, and for several years prior thereto was confined in an asylum for the insane, and for three years before his confinement in the asylum was a person of failing intelligence.

The present bill was filed against the widow, the person to whom the deed was made. She denied all of the allegations of fraud, and also interposed the defense of the statute of limitations of seven years.

The purpose of the bill was to rescind the deed to the defendant, Dora R. Hidell, and to recover the land of her.

When the case was called for trial, certain issues were formulated and a jury called to try them. The issues and the responses of the jury thereto were as follows:

“(1) Was the deed of April 24, 1877, obtained by

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W. H. Hidell from complainant by promise to hold the property therein described in trust for complainant's use and benefit? A. Yes.

"(2) Was the deed of June 17, 1889, to defendant, Dora Hidell, procured from complainant by W. H. Hidell by false and fraudulent misrepresentations? A. Yes.

"(3) When did the complainant, Mary Boro, learn the truth with regard to the value of the land conveyed by her in said deed of June 17, 1889, the amounts expended by Hidell on said land in her behalf, and the character and value of the services claimed to have been rendered by said Hidell in the Woodward suit? A. Personally in 1908, but through her agent, James Boro, in 1890.

"(4) When, by the exercise of due diligence upon her part, should she have learned the truth with regard to these transactions? A. 1890.

"(5) Was Mary Boro informed that the deed of 1890 to Dora R. Hidell was procured from her by fraud? If so, when? A. Yes; in 1890, when her agent, James Boro was informed.

"(6) When could she, by due diligence, have been so informed? A. 1890.

"(7) What was the amount of rents received by W. H. Hidell from the half interest of complainant in the forty-three acres involved in this lawsuit up to the 17th day of June, 1889, when the property was conveyed to the defendant, Mrs. Hidell? A. \$550.

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"(8) When, if at all, did the confidential relation between Mary Boro and W. H. Hidell cease to exist?
A. 1890."

Upon the verdict of the jury coming in, the complainant first made a motion for a new trial, which was overruled. She then moved the court for a judgment in her favor upon the verdict. This was overruled. Then the defendant moved for a judgment on the verdict in her favor, which was granted, to the effect that the defendant had been in adverse possession of the property in controversy, claiming it under the deed of June 17, 1889, from the date of that deed, and that this deed was duly registered in Shelby county; that her possession had been continuous; that she was protected by the statute of limitations of seven years; that nothing had been shown by the complainant to affect the bar of the statute; that the complainant's bill should be dismissed at her cost.

From the foregoing decree, the complainant appealed to this court, and has here assigned errors.

In order to properly understand the purport of the verdict as to the agency of James Boro, it should be stated that the record shows the following facts:

James Boro is a brother of the complainant. In the fall of 1889, or the early part of 1890, when he learned that the deed of June 17th had been made, he wrote to his sister, the complainant, that her uncle, W. H. Hidell, had robbed her of her property. She says in her testimony that he did not relate to her the particulars

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of the fraud, or in what it consisted, and he says that he does not recall that he did. It seems the letters that passed between the brother and sister, covering that period, have been lost or destroyed. We think it very remarkable that he did not inform her of the particulars—so remarkable as to be almost incredible. In stating the matter in this way we do not, in the least, mean to impeach the veracity of the complainant. We deem her to be an honest, upright, good woman. She has no doubt forgotten the particulars of the transactions of that time; her time and thought having been wholly devoted to her religious vocation. It is probably a true construction of the answer to the third issue that the jury meant to say that she had learned of these matters through her brother in 1890, that is, that he had informed her of the particulars; but we have not decided the case upon this assumption.

It appears, from complainant's cross-examination, and from the cross-examination of James Boro, that in the latter part of 1889, or the early part of 1890, she appointed her brother, James Boro, as her agent to look after her interest in the forty-three acres, and also a storehouse on Second street, in Memphis, and all other property which she had claims to in the hands of W. H. Hidell, and to recover for her whatever he could.

James Boro admits, in his deposition, in the cross-examination, that he had full knowledge as far back as 1890 of all of the particulars of the fraud; that he then knew that Hidell's letter of May 10, 1889, which

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his sister had sent to him, along with other letters of Hidell's misrepresented the facts to her in the various particulars above mentioned, and which are referred to in the third issue submitted to the jury. These misrepresentations consisted of misstatements which Hidell made to her as to what he had paid Mr. King, and what she owed him, and as to the value of the property, and as to what he had gotten out of the property, by virtue of which misrepresentations he procured the deed from the complainant. We say the evidence shows clearly that in 1890 James Boro knew fully the extent of the fraud. He was then the agent of the complainant, with full power to assert her rights.

The present bill was not filed until the lapse of eighteen years after the fraud was perpetrated. During all this time the defendant, Dora R. Hidell, had been in adverse possession of the land, claiming it as her own.

1. It is insisted that the statute of limitations of seven years (Acts 1819 [2 Scott's Comp. Laws, p. 482] c. 28, section 1) did not run at all, because during the whole time the defendant, Dora R. Hidell, was a non-resident of the State.

In support of the point the complainant refers to section 4455 of Shannon's Code, which reads as follows:

"If at any time any cause of action shall accrue against any person who shall be out of this State, the action may be commenced within the time limited therefor, after such person shall have come into the State; and after any cause of action shall have accrued, if the per-

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son against whom it has accrued shall be absent from, or reside out of the State, the time of his absence or residence out of the State shall not be taken as any part of the time limited for the commencement of the action."

It is insisted that the terms of this statute are broad and general, and that no exception thereto can be made by the court. We are referred by complainant's counsel, in the very able brief filed, to numerous cases from other states having similar statutes, in which it has been held by the great majority of them in accordance with the contention just stated. On the other hand, it is insisted by defendant's counsel that the decisions of this court bearing upon the question hold that where the action may prosecuted without the necessity of personal service upon the defendant, and full relief granted, the statute quoted does not apply.

The contention of defendant's counsel is correct as to the state of our authorities upon the subject. The leading case is *Taylor v. McGill*, 6 Lea, 294.

In this case the facts alleged in the bill were, in substance, that one A. Hynes Ewing had died the owner of certain real estate; that before his death the land had been levied on by one Marshall for a debt of \$800; that it was sold after his death; that the widow of Ewing had fraudulently purchased it with a view to placing it out of the reach of creditors; that there were no personal assets; that the administratrix had been absent from the State most of the time since the death of her

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husband; that complainant had certain debts against the estate of the deceased. The purpose of the bill was to set aside the deed made to the widow and to subject the land as the land of the decedent. The statute of limitations of three years (against nonresident creditors) applicable to the estates of decedents was pleaded. It was insisted in behalf of complainant's in that case that the section of the Code which we have above quoted, taken from the act of 1865 (Acts 1865, p. 27, c. 10, section 3), prevented the running of the statute of limitations. In response to this contention the court said:

"What is not within the purpose or meaning nor within the mischief to be remedied by a statute cannot be held included in the law, even though literally the language might include it. . . . The nature of this suit, then, will solve the question as to the application of the statute. Could the parties to these bills have proceeded, within the time of absence of the administratrix, to enforce the precise claim they now make as creditors of A. Hynes Ewing, deceased, against his real estate, or interest which he owned in real estate of his deceased father, under the facts stated in these bills? There were no personal assets to be exhausted before proceeding to subject the real estate descended to the payment of the debts of the deceased debtor. The heirs of said deceased are not alleged to have been nonresidents, nor any difficulty in making them parties to a proceeding under the act of 1827 (section 2267 of the Code of 1858). By this section this proceeding may, it

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is true, be instituted by the administrator; but precisely the same right is given on the part of a 'bona fide creditor whose debt remains unpaid.' Either may file his bill or petition in the courts having jurisdiction, have an account of the debts due, and a sale of the land for their payment, when they are shown to exist as required by the statutes. We can see no possible difficulty in the way of these creditors, had they chosen thus to proceed. There might have been the same proceeding, in substance, as the one now before the court, and there was no legal obstacle to such a proceeding. The fact that the widow and administratrix had purchased the lands might have been alleged, precisely as here, and she have been made party by publication. The court, having the property under its jurisdiction and control, could have effectuated a decree against it, and thus, if these creditors had the rights now claimed, they could have been made good and effectual for the satisfaction of their debts. . . . The principle we decide is that where the party had his remedy complete and unaffected by the absence of the administrator or defendant then such absence has not affected his right to sue, and is therefore not within the purpose of the act of 1865, preventing the lapse of time effectuating the bar of the statute during the absence of a party to be sued."

It was accordingly held that the bar was complete, more than three years having elapsed between the death of the deceased and the filing of the bill.

The foregoing case was reaffirmed in the latest case

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we have upon the subject. *Turcott v. Railroad*, 101 Tenn., 104, 45 S. W., 1067, 40 L. R. A., 768, 70 Am. St. Rep., 661. The facts of that case were in substance that a person who had been injured in the shops of the railroad company in Vicksburg, Miss., a year and a half before the action was brought in Shelby county, this State, was met, when he did bring suit, by a plea of the statute of limitations of one year applicable to that subject. He endeavored to escape the operation of the statute by the fact that the railroad company was a non-resident corporation and had never complied with our statutes regulating the entry of foreign corporations into this State, concerning the registration of their charters, etc. It was shown that, although the company had not so complied, it had been doing business in Shelby county for many years, and had a regular corps of agents for the purpose. The court held that, although there had been no compliance with the statutes above referred to concerning foreign corporations, yet the company was all the time liable to suit, since it actually had agents within the State and was doing business here. It was further held that, being so liable, the action could have been brought at any time within the one-year term, and not having been brought, the plaintiff in that case was barred. The same principle was reaffirmed as late as 1904 in the case of *Green v. Snyder*, 114 Tenn., 100, 84 S. W., 808.

We have four other cases in this State; but three of them (*Ridge v. Cowley*, 6 Lea, 167; *Barbour v. Irwin*,

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14 Lea, 720; *Kempe v. Rader*, 86 Tenn., 191, 6 S. W., 126) have no bearing upon the special phase of the question we now have before us. There is another case, *Carlin v. Wallace*, 13 Lea, 573, that does have such bearing, though perhaps not in a direct way. In that case it appeared that Carlin had previously bought from Wallace, a resident of Georgia, a lot in the city of Chattanooga by title bond. He paid part upon the property, and failing to pay the rest of the purchase money, a suit was brought against him, and the lot sold therefor, and purchased by Carlin at the master's sale. He stated in his bill that when he made a certain payment there was an agreement between Wallace and himself that, if any mistake in calculation had been made, Wallace would return the difference, and that in fact a mistake of a certain sum was made, for which Wallace was indebted to him. The bill also alleged that Carlin had now paid for the land, and that he was entitled to a deed from Wallace, with covenants of warranty. He attached some other property that Wallace had in Chattanooga to make good the claim set forth in the bill. More than six years, the limitation period, had expired when the bill was filed, and the statute of limitations was accordingly pleaded by Wallace. The court held in that case that no time had commenced to run against the complainant, although he might at any time within the six years, have commenced his action in the form of an attachment proceeding, as was finally done.

A distinction is to be taken between a suit by attach-

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ment and one of the kind we have now before the court, or one such as was the subject of the opinion in *Taylor v. McGill*, because, in attachment cases, complete relief cannot be given, inasmuch as, if any balance be due upon the debt after the exhaustion of the property attached, there can be no personal judgment rendered therefor, while in the kind of case we now have before us there is no necessity for personal judgment. However, the case of *Carlin v. Wallace* was, in effect, overruled in an oral opinion delivered in a recent case at Knoxville. *Templeton v. British Association*.

In the kind of case we now have before us, complete relief could be given without personal service of process. It is a real action brought in the county where the land lies, and the parties interested may be made parties to the suit by publication. *Ray v. Haag*, 1 Tenn. Ch. App., 249.

It has been the constant practice in this State to proceed in real actions in the manner stated, when no personal service could be had upon the persons against whom the relief was sought. To hold differently now would probably shake many titles. The doctrine of *Taylor v. McGill* has become a rule of property.

We shall not refer especially to any of the authorities cited from other States construing similar statutes differently from the rule laid down in *Taylor v. McGill*. We may say, however, that we are much less concerned over a difference in the construction of statutes than we would be if the weight of authority should be found

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against us on the announcement of a common-law rule.

The reason assigned in the authorities construing the statutes of other States upon this subject is that, where the legislature makes no exception to generality of an act, the courts can make none by construction.

This was the argument used in the earlier cases in this State, when the principle was struggling for recognition in equity that the statutory limitation would not run during the time when the cause of action had been fraudulently concealed. The operation of the principle was for a time stayed thereby, but it triumphed in subsequent cases. The same suggestion was made from time to time when the question arose whether a statute could operate when the courts were closed during the civil war, when no action could be brought. After the expression of some doubt upon the point in one or two cases, and the decision of these cases upon other grounds, the court finally decided that the exception did exist. *Yancy v. Yancy*, 5 Heisk., 353, 354, 13 Am. Rep., 5; *Peak v. Buck*, 3 Baxt., 71. So it has been held that, although the law requires that a widow shall dissent from her husband's will within one year after the testator's death or otherwise be bound by it and no exception is made in the statute in favor of one who has been prevented by fraud of the executor or of others interested in the estate from making her election, yet it has been held in equity that an exception exists in favor of such person. *Smart v. Waterhouse*, 10 Yerg., 94; *Morrow v. Morrow*, 3 Tenn. Ch., 532, 534. It also has been held

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that, although the statute upon that subject makes no reservation in favor of persons who have been prevented by mental incompetency, yet in equity the statute would be so construed as to permit the dissent, notwithstanding the time had elapsed. *Wright v. West & Wright*, 2 Lea, 78, 83, 84, 85, 31 Am. Rep., 586. This court has held, and many other courts, and the doctrine is a general one, that statutes are to be construed under the rule on which this court acted in *Taylor v. McGill*. Indeed, it is difficult to think of a statute which may not be subjected to such construction. *Rose v. Wortham*, 95 Tenn., 505, 508, 509, 32 S. W., 458, 30 L. R. A., 609 et seq., and cases cited; *Maxey v. Powers*, 117 Tenn., 381, 403, 404, 101 S. W., 181; *Wright v. Cunningham*, 115 Tenn., 445, 91 S. W., 293; *Miller v. Wolfe*, 115 Tenn., 234, 89 S. W., 398; *Hamblen County v. Cain*, 115 Tenn., 279, 89 S. W., 103; *Nichols & Shepherd Co. v. Loyd*, 111 Tenn., 145, 76 S. W., 911; *Hardin v. Hassell*, 118 Tenn., 143, 100 S. W., 720, syllabus 6.

2. The next contention offered by complainant is that the cause of action was fraudulently concealed from the complainant until 1908, when her suit was brought. In response to this point it is insisted by the defendant that, even assuming that there was a fraudulent concealment, there is no case in this State which holds that this would prevent the running of the statute. In our early cases there appeared to have been considerable doubt upon this point. The rule was clearly announced in *Shelby's Heirs v. Shelby*, Cooke, 179,

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5 Am. Dec., 686, but reserved in the later case of *Porter's Lessee v. Cocke*, Peck, 30, 46, but seems to have been conceded in *Reeves v. Dougherty*, 7 Yerg., 232, 236, 237, 238, 27 Am. Dec., 496, also in *Haywood v. Marsh*, 6 Yerg., 69, and in *Smart v. Waterhouse*, 10 Yerg., 105. It was announced in *Nicholson v. Lauderdale*, 3 Humph., 200; *Haynie v. Hall's Ex'r*, 5 Humph., 290, 292, 42 Am. Dec., 427; *McLain v. Ferrell*, 1 Swan, 48, 52; *Peak v. Buck*, 3 Baxt., 71, 72; *Vance v. Mottley*, 92 Tenn., 310, 21 S. W., 593; *Woodfolk v. Marley*, 98 Tenn., 467, 471, 40 S. W., 479, etc.

It is further insisted by the defendant that since James Boro, the agent of complainant, had full knowledge of the cause of action as early as 1890, the complainant was affected by this knowledge, and the statute began to run from that time. It is contended, however, by the complainant, that the knowledge of the agent would not affect the principal, and we are referred to the case of *Yarbrough v. Newell*, 10 Yerg., 376, 381, 382. The cases we have upon the subject, in addition to the one just referred to, are *Duke v. Harper*, 6 Yerg., 280, 284, 287, 27 Am. Dec., 462; *Union Bank v. Campbell*, 4 Humph., 394; *Tagg v. Tennessee Nat. Bank*, 9 Heisk., 479, 483, 484; *Rhat v. Mining Co.*, 5 Lea, 1, 63; *Bank v. Smith*, 110 Tenn., 337, 345, 75 S. W., 1065. These cases all announce the rule that the principal is bound by the knowledge of his agent, in the mind of the agent at the time he is acting for the principal. We are not sure whether the cases in 6 and 10

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Yerger are modified by the latter cases, which state the rule in broad, general terms; but, assuming that they are not so modified, still the facts of the present case bring it within the general rule, and not within the exceptions stated in the two cases last referred to. In *Duke v. Harper* the duty of the agent was confined simply to the collection of rent. It was held that notice to him by the tenant that he disclaimed the title of his landlord would not be binding upon the landlord, unless actually communicated to him, because the agent had no authority to enter upon the premises, or to sue for them, upon the disclaimer. In *Yarborough v. Newell* it appears that Yarborough had mortgaged certain property to Newell, and that Niblett subsequently went as his agent and tendered a certain sum of money in redemption, and that Newell stated to Niblett that, while Yarborough had at one time a right to redeem, the time had expired. It did not appear that the agent informed his principal of this fact. The court held that as Niblett was Yarborough's agent only to tender the money, and, as he had no authority to sue upon failure to receive this money, the notice was not binding upon the principal. It is doubtful whether this case does not state the rule too narrowly. However, assuming that it is a correct statement, still it appears in the present case that James Boro had full authority from his sister to act for her to obtain restitution of the land in controversy. We are of the opinion that under this authority, as disclosed in the depositions of both James

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Boro and the complainant, he would have had the right to sue at any time after the matter was placed in his hands. The right of action was therefore barred at all events at the expiration of seven years from the year 1890. This suit was not brought until 1908, nearly eighteen years after the suit could have been brought.

3. It is also insisted by the defendant that, every other point aside, the bill must be dismissed, because the limitation of seven years began to run in favor of Mrs. Dora R. Hidell, although she was a fraudulent grantee, from the date of the deed made to her (which was, in effect, a voluntary conveyance made by the husband to his wife, although the deed was made directly by complainant), and that the concealment of the cause of action by W. H. Hidell, the husband, would not stay the running of the statute of limitations as against the said fraudulent conveyee, the wife. That the statute of limitations protects a fraudulent vendee is clear under the authorities (*Porter's Lessee v. Cocke*, supra; *York v. Bright*, 4 Humph., 312; *Ramsey v. Quillen*, 5 Lea, 184; *Mull v. Paul*, 2 Tenn. Ch., 155); and that the concealment of the cause of action by the vendor or principal will not prevent the running of the statute of limitations in favor of such fraudulent vendee is fully sustained by *Howell v. Thompson*, 95 Tenn., 396, 404, 32 S. W., 309, et seq.; *Bates v. Preble*, 151 U. S., 149, 162, 14 Sup. Ct., 277, 38 L. Ed., 106.

The question of laches is discussed by both sides in the briefs; but, as the points already determined are

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fully decisive of the case, we need not go into this question.

It results that there is no error in the decree of the chancellor in dismissing the bill, and it must be sustained, with costs.

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JOHN R. GODWIN v. E. E. TAENZER *et al.*

(*Jackson*. April Term, 1909.)

1. **STOLEN PROPERTY.** Theft of timber does not affect owner's title.

The owner of timber does not lose his title thereto when the same is feloniously taken or stolen. (*Post*, pp. 103, 104.)

Case cited and approved: *Silsbury v. McCoon*, 3 N. Y., 379.

2. **SAME. Same.** Thief's sale of stolen timber does not affect owner's title.

The thief's sale and transfer of stolen timber does not deprive the original and true owner of his title or right to possession, whether the purchaser be innocent or a guilty participant in the crime. (*Post*, pp. 103, 104.)

3. **SAME. Same. Same.** Owner may recover the indentified timber, or its value in its changed form, from an innocent purchaser from the thief.

The landowner, whose timber was felled, stolen, and sold by the thief to persons who bought it in good faith and innocently converted it to their own use by the assertion of ownership at the time of the purchase or otherwise, is entitled to recover the possession thereof from such purchasers, if it can be identified, either in its original or changed form or condition, but if such purchasers have appropriated it so that it can be no longer identified or followed in an action for its specific recovery, then the owner is entitled to a recovery against such purchasers for its full value at the moment of its conversion by them, by their such purchase, without any deduction for the value of the labor and time, or of the money expended by the thief or wrongdoer in working the change.

Cases cited and approved: *Ware Co. v. United States*, 106 U. S., 432; *Silsbury v. McCoon*, 13 N. Y., 379; *Neshitt v. Railroad*, 21

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Minn., 491; Coal Co. v. Shoe Co., 69 Ark., 302; Everson v. Seller, 105 Ind., 266; Parker v. Railroad, 81 Ga., 387.

Cases cited, distinguished, and approved: Dougherty v. Chestnutt, 86 Tenn., 12; Holt v. Hayes, 110 Tenn., 42.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

G. J. MCSPADDEN, for complainant.

CARUTHERS EWING and R. E. KING, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The question of law raised on the record in this case is: What is the measure of recovery to which the complainant, from whose land timber has been feloniously taken, is entitled as against the defendants, who innocently purchased the same from the felon and as innocently converted it to their own use? The contention of the defendants is that, having bought and appropriated the timber in good faith and without any knowledge of the true ownership, they should be charged the value of the timber at the place where the trees

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were felled from which it was cut, and not its market value at the point where it was delivered to and accepted by them.

It is certain that the complainant did not lose his title to the timber because of the felonious taking. As was said in *Silisbury v. McCoon*, 3 N. Y., 379, 53 Am. Dec., 307: "No man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession of the thief or the trespasser is a continuing trespass, and if during its continuance the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by making logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, . . . the manufactured article still belongs to the owner of the original material, and he may take it, or recover its improved value in an action for damages." In such an action the felon would not be permitted to reduce the owner's recovery in an action for conversion of his property by showing that his expenditure of labor, time, and money, in either preparing the chattel for or transporting it to market, had enhanced its value. This being true, we can conceive of no principle upon which the purchaser from the felon should be allowed credit for these expenditures of the felon when called to account by the owner of the stolen chattel. During the little time it was in the possession of the felon the title of

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the true owner remains intact, and this continues to be so at the time of the sale and transfer by him of possession to the purchaser. This is no less true after this transfer, whether the purchaser be innocent or a guilty participant in the crime. However innocent he may be, if the owner identifies the chattel, either in its original or changed condition, he may recover possession from the purchaser, and, if the latter has appropriated it, so that it can be no longer followed in an action, the owner is entitled to a recovery for its full value at the moment of its conversion by the purchaser; and the purchaser's assertion of ownership at the time of his purchase is a conversion no less than that of the wrongdoer from whom he made his purchase. The correct rule in such a case is clearly stated, and maintained on reason and authority, in *Bolles Wooden Ware Co. v. United States*, 106 U. S., 432, 1 Sup. Ct., 398, 27 L. Ed., 230. There timber had been wrongfully cut from the lands of the government. The timber on the ground after it was felled was worth only \$60.71. It was transported by the wrongdoer to a distant point, and there was sold for \$850 to a party who had no knowledge of the wrong that had been committed by his vendor. It was insisted in that case, as in this, by the purchaser, that he could only be called upon to account for the value of the timber at the place where it had been cut. This contention, however, was held to be unsound. The court said, in the course of the opinion:

"The timber at all stages of the conversion was the

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property of the plaintiff. Its purchase by the defendant did not divest the title, nor the right of possession. . . . This right at the moment preceding the purchase by the defendant at Depere was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. . . .

"On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by work or labor by the defendant after he had purchased the same, the rule might be applied as in the case of the inadvertent trespasser. But here he has added nothing to the value. He acquired possession of property of the United States at Depere, which at that place and in its then condition is worth \$850, and he wants to satisfy the claim of the government by the payment of \$60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition, that in purchasing the property, he purchased of the wrongdoer a right to deduct what the labor of the latter had added to its value. . . .

"To hold that when the government finds its own

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property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement, and reward to the wrongdoer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual."

The principle thus announced has been recognized and applied in *Nesbitt v. St. Paul L. B. R. Co.*, 21 Minn., 491; *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark., 302, 63 S. W., 49; *Everson v. Seller*, 105 Ind., 266, 4 N. E., 854; *Parker v. Waycross R. R. Co.*, 81 Ga., 387, 8 S. E., 871, and many other cases.

It is insisted, however, by the counsel for defendant, that a different rule has been established in this State in the cases of *Dougherty v. Chestnutt*, 86 Tenn., 12, 5 S. W., 444, and *Holt v. Hayes*, 110 Tenn., 42, 73 S. W., 111. The first of these cases has no bearing upon the question at issue here. There, under an honest, but mistaken, claim of title, a trespasser had invaded a marble quarry and removed and sold it, and it was held that the measure of damages to which the true owner of the quarry was entitled against the trespasser was the value of the marble taken as it lay at the quarry, cut, dressed, and prepared for market, less the expense of thus cutting and dressing and preparing it.

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Nor is the last of these cases any more authority for the contention of the defendant. There the suit was to recover from the defendant the value of timber which had been wrongfully cut from the land of the complainants and by the trespasser had been sold to the defendant. Without knowledge of the trespass the defendant purchased a small amount of this timber, when he was notified by the complainants that his vendors were trespassing upon the lands of the complainants in cutting and removing timber, and was requested to buy no more of it. In the face, however, of this notice, the defendant thereafter purchased seventy-seven cords of timber, worth \$77 in the tree in the woods, but worth \$246.40 in stave bolts delivered at the factory of the defendant, in which form the trespasser prepared the timber and sold it to the defendant. No question was made as to the measure of damages as to the lot of timber purchased by the defendant before the notice given to him by the complainants. The only controversy was as to the amount with which the defendant was chargeable for that purchased by him after this notice. The contention of the defendant was that as to this timber the true measure of damages was its value as it stood in the tree at the time it was cut, "and at all events the defendant should be allowed the cost of converting the timber into merchantable form." This contention was rejected by this court, and it was held that he was liable "for the timber after it had been converted into stave bolts." In other words the court held that the

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purchaser was not entitled to have the recovery against him reduced by the value of the labor bestowed upon this timber by the trespasser in converting it from its original form into stave bolts. We see nothing in this holding which is contrary to the rule announced in the authorities referred to above, but rather its distinct ruling is that the act of the wrongdoer did not strip the landowner of any right, and that he was entitled to the value of his timber in its changed form, unreduced by the value of the labor and time, or of the money expended by the wrongdoer in working this change.

This was the view of the chancellor in the present case, and as to this point his decree is affirmed.

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E. J. CHILDERS v. WM. H. COLEMAN COMPANY *et al.**

(*Jackson*. April Term, 1909.)

1. **REMOVAL OF CLOUD UPON TITLE.** Landowner may question the making of extension of timber contract made by his vendor, when.

The purchaser of land filing a bill in chancery to obtain a decree declaring the title and possession of land to be in him as against the defendants claiming all the white oak timber thereon under a sale thereof and extension of time for the removal of the timber, made by complainant's vendor, without notice to complainant, actual or constructive, may question the making of the extension, and its validity, because it vitally affects the title to his land. (*Post*, pp. 121, 122.)

Case cited, approved, and distinguished: *Iron Co. v. Iron Co.*, 11 Heisk., 434.

2. **REGISTRATION.** Unacknowledged instrument is not entitled to registration.

The assignment of the sale and conveyance of all the white oak timber on certain land, when not acknowledged, is not entitled to registration. (*Post*, p. 122.)

3. **SAME.** Omission of words "for the purposes therein contained" in certificate of acknowledgment is fatal to its registration.

The omission, in the certificate of acknowledgment of an instrument, of the words "for the purposes therein contained," the concluding clause in the prescribed statutory form of acknowledgment, is fatal to the registration of the instrument. (*Post*, pp. 122, 126.)

*As to oral contract for sale of timber, see note to *Hirth v. Graham* (Ohio), 19 L. R. A., 721.

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Cases cited and approved: Ellett v. Richardson, 9 Bax., 295; Currie v. Kerr, 11 Lea, 138; McGuire v. Gallagher, 95 Tenn., 355; Hughes v. Powers, 99 Tenn., 485.

4. **SAME.** Assignment of sale of growing trees and extension of time for removal must be registered.

Instruments assigning a contract for the sale of growing trees and an extension of the time limit for the removal thereof transfer an interest in land, and are required to be registered. (*Post*, pp. 122, 123.)

Case cited and approved: Ives v. Railroad, 142 N. C., 131.

5. **STATUTE OF FRAUDS.** Sale of growing timber must be in writing.

Growing trees are a part of the realty, and consequently a sale thereof must be evidenced by a writing. (*Post*, pp. 123-126.)

Case cited and approved: Ives v. Railroad, 142 N. C., 131, and 9 Am. & Eng. Am. Cases, 188, and note.

Cases cited and distinguished: Iron Co. v. Iron Co., 11 Heisk., 441; Knox v. Haralson, 2 Tenn. Chy., 232; Dorris v. King (Tenn. Chy. App.), 54 S. W., 683.

6. **SAME.** Leases for more than one year, to be good, must be in writing.

A conveyance extending the time to remove growing timber, even if it be considered as a lease, is within the statute of frauds, and so, to be good for more than one year, it must be in writing. (*Post*, p. 126.)

7. **SAME.** License to enter land must be in writing.

A conveyance extending the time to remove growing timber, even if it be viewed as creating an irrevocable license to enter, is in the nature of an easement, and must be in writing. (*Post*, p. 126.)

Case cited and approved: Nunnally v. Iron Co., 94 Tenn., 397.

8. **REGISTRATION.** Without acknowledgment or with fatally defective certificate is not constructive notice.

The registration of an instrument, either without acknowledgment or with a fatally defective certificate of acknowledgment,

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so that in either case it is not entitled to registration, is not constructive notice. (*Post*, pp. 113, 114, 126.)

9 INNOCENT PURCHASER. Without notice, actual or constructive, of prior incumbrances or equities will be protected.

An innocent purchaser of land, for value, without notice, actual or constructive, of any prior incumbrances or equities, is entitled to a decree for the land as against claimants of such priorities. (*Post*, p. 126.)

FROM HARDEMAN.

Appeal from the Chancery Court of Hardeman County.—E. L. BULLOCK, Chancellor.

J. A. FOSTER, ISAAC ORME, and BEN CHILDERS, for complainant.

C. A. MILLER and C. G. BOND, for defendants.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

Complainant filed this bill, alleging his ownership in fee of a tract of land in Hardeman county comprising three hundred acres, and that the defendants Wm. H. Coleman and J. M. and F. L. Marshall had entered upon said land and were committing waste by cutting and removing timber. Defendants answered the bill, averring that on March 7, 1904, and prior to complainant's purchase of said land, its then owner, J. S. Neely,

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sold and conveyed to one W. E. Small all of the white oak timber on said land, and that on July 12, 1906, the said W. E. Small, for value received, assigned all of his rights and title to said timber contract to the William H. Coleman Company without recourse.

It is averred in the answer that under the original contract the said W. E. Small was allowed three years from the date of said contract to cut and remove said timber, and that thereafter J. S. Neely, the vendor, extended the time for the removal of said timber for a period of two years from July 12, 1906. Hence it is seen that the defense interposed on behalf of defendants is that the William H. Coleman Company had acquired title to the white oak timber on said tract of land by assignment of a contract made with J. L. Neely, the vendor of complainant, some time prior to the sale of said land by the said Neely to complainant, Childers.

On the coming in of the answers, complainant filed an amended bill, alleging:

"That on the 3d of October, 1907, J. S. Neely and wife, E. A. Neely, were in the actual possession of the lands described in the original bill, and represented to him that said land was unincumbered; that he paid to them \$800 the cash consideration, and executed his two promissory notes, due in one and two years, for \$800 each, and delivered the same to J. S. Neely and wife, and prior to that time complainant had no notice, actual or constructive, of any alleged claim of defendants; that, when he purchased said land, defendants were

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not in possession, and so far as complainant knew, were not claiming any right to enter upon said land; and he states on information and belief that defendants had never been in actual possession of said land or the timber, had never cut or removed, and had never attempted to cut or remove, any white oak or other timber from said land up to and for some time after complainants had purchased said land."

Complainant further states as follows:

"He was put in possession of the land by said J. S. Neely on the 3d of October, 1907, and knew nothing of the claim of defendants until after he filed his original bill; that he is an innocent purchaser for value, and had no notice of the sale or transfer of the white oak timber then standing on said land, and that he paid a valuable consideration for the same; that defendants had entered upon said lands, without the knowledge of complainant or his consent, cut and removed and wasted valuable timber, and otherwise damaged complainant to the extent of \$300."

It is further charged in the amended bill:

"That the instruments purporting to be deeds of conveyance under which defendants claim a superior title were neither actual nor constructive notice to complainants, for the reason that said assignment did not describe the land, and the instrument purporting to extend the time limit, contained in the original contract for the removal of the timber, was obtained through fraud, and was not properly acknowledged, and the cer-

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tificate of the notary was not in compliance with the statute."

It was therefore charged that said instruments were not entitled to registration and that no notice was thereby conveyed to complainant.

The prayer of the amended bill is that complainant be declared an innocent purchaser for value without notice, and that he be decreed the title and possession of said land, etc.

Proof was taken, and on the hearing the chancellor, Hon. E. L. Bullock, presiding, decreed that the title of complainant to the land and timber was superior to any claim of the defendants, and that the conveyances under which defendants claimed title constituted a cloud on complainant's title. The chancellor made perpetual the injunction restraining the defendants from cutting and removing timber or otherwise committing waste, and pronounced a decree in favor of complainant for the value of timber already cut, and the damages accruing by reason of said waste, and ordered a reference to the master to take proof and report the amount of said damages. At the March term, 1909, the chancellor rendered a judgment in favor of complainant against the defendants for the sum of \$150 for the trees cut and removed by the defendants, and the further sum of \$9 as damages caused to the small timber by reason of the trees cut falling against and injuring same. The W. H. Coleman Company appealed from all of said decrees and has assigned errors.

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The first assignment is as follows:

"The chancellor erred in decreeing that the title of complainant, E. J. Childers, is superior to the claim of defendants in and to the land and timber described in the pleadings, and that the claim of the defendants to the white oak timber on said lands is not valid, but constitutes a cloud on complainant's title, because the proof in the record shows that the contract under which the Wm. H. Coleman Company claimed ownership and title to the white oak timber was prior in time, and therefore superior in right, to any claim or title that complainant, E. J. Childers, had to said white oak timber. J. S. Neely, from whom both complainant, E. J. Childers, and the defendant Wm. Coleman Company claim title, conveyed and transferred all of the white oak timber on the three hundred acres of land described in the pleadings to W. E. Small, by contract dated March 7, 1904; that on July 12, 1906, he extended the time for the cutting of the white oak timber on the lands sold to Small, and later sold to W. H. Coleman Company, to two years from date."

The second assignment of error will be considered in this connection, and is as follows:

"Second. The chancellor erred in making the injunction perpetual. The weight of the proof is that the appellee had notice of the timber contract of J. S. Neely with appellant at the time that he bought the land. The rule '*caveat emptor*' applies to him."

The facts established by the record are that in Oc-

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tober, 1907, complainant, Childers, who resided at Pulaski in Giles county, purchased this land, lying in Hardeman county, through a resident agent, one Camody. At the time of the sale Mr. Isaac Orme represented the vendor, J. S. Neely and wife. An abstract of title to the land was prepared at the instance of the vendor and sent to Mr. Childers at Pulaski; and, the title having been pronounced perfect by the abstracter, Mr. Childers accepted the deed and made a cash payment of \$800, executing his notes for the two deferred payments of \$800 each. The deed was executed on the 3d of October, 1907, and Mr. Childers was immediately put in possession of the land. The complainant had no actual or constructive knowledge, at the time he purchased the land, that the defendant W. H. Coleman Company claimed any right, title, or interest in the white oak timber on said land. It also appears that, at the time Childers was put in possession, no agent or employee of the defendant W. H. Coleman Company was in possession of said land nor did the complainant become apprised of any trespass on said land until after the lapse of about two weeks, when some of the defendant's agents went upon said land and began to cut and remove timber; the number of trees cut not exceeding 13. Thereupon complainant filed the present bill, asserting his title in fee to the land, and seeking to restrain the defendants against trespassing and committing waste.

As already stated, the defendant Coleman relied on

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a contract assigned to that company by W. E. Small, July 12, 1906. The contract is as follows:

"For and in consideration of \$400 to me in hand paid, I (or we) hereby sell and convey to W. E. Small, or assigns, all of the white oak timber on my land situated in Hardeman county, State of Tennessee, district No. 11, bounded as follows: On the east by Trim, on the north by Mills, on the west by Rogers and Mills, and on the south by Campbell—containing about 300 acres. Said land known as the — place, and lies — miles of —. Said Small shall have three years from this date to work same, and shall have right of way to land and timber, with men and teams, to cut and remove same at his pleasure. There is no incumbrance or claim on said land that will interfere with said Small working said timber.

"Signed at Pocahontas, Tenn., this 7th of March,
1904. [Signed] J. S. NEELY.

"Witnesses:

"B. D. IRBY.

"G. L. PARIS."

It will be noticed this instrument was not acknowledged, and expired by limitation on March 7, 1907, seven months before the conveyance to Childers. On the back of this instrument, is the following indorsement:

"July 12, 1906.

"For value received, I assign all of my rights and title to the within timber contract to Wm. Coleman Co., without recourse.
"W. E. SMALL."

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It appears that on July 12, 1906, the day on which this assignment was executed, J. M. Marshall, as agent for Wm. Coleman Company, went to Dr. Neely to procure an extension of the time limit of three years contained in the original contract. Dr. Neely testified that Marshall stated to him:

"That he would like to get an extension of the time for cutting the timber, provided he could buy the contract from Small. I told him, if he could arrange to get Small's contract, that I would give him one year's time from that date, and he wrote out an agreement, as I supposed, in keeping with our conversation to that effect, and, being busy at the time, I did not take time to read it, but signed it, and he went away."

It appears that one year's extension of the time limit of three years, contained in the original contract, would have extended the time for cutting the timber until July 12, 1907, or three months before the date of the deed to Childers, which was executed by Dr. Neely, as already stated, October 3, 1907.

It appears, however, that on April 23, 1907, Marshall, accompanied by M. Wilson, a notary public, returned to Dr. Neely with the contract, which had already been signed by Dr. Neely, for an extension of the time, for the purpose of having the instrument acknowledged. The instrument produced, instead of extending the time for one year, extended it to two years from date, and was as follows:

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"Pocahontas, 7—12—1906.

"This is to certify that I have extended the time for cutting the white oak timber on my lands, sold to W. E. Small, and later transferred to W. H. Coleman Company, to two years from date.

"J. S. NEELY."

Dr. Neely declined to execute this instrument, although he had previously signed it, for the reason that it contained an extension of the time limit to two years, instead of one year, as he had agreed, and which he supposed had been properly inserted in the contract. Several witnesses, who were present, testify that Dr. Neely refused to acknowledge this instrument on the ground that it did not embody his agreement with Mr. Marshall. This fact is admitted by Mr. Marshall himself, as well as by Mr. Wilson, the notary public, who was present.

But, despite the fact that Dr. Neely had repudiated the instrument and refused to acknowledge it, Marshall procured the notary public to attach his notarial certificate, certifying to the acknowledgment. The form of the certificate, however, was in the following language: "*State of Tennessee, Hardeman County*:"

"Personally appeared before me, M. Wilson, a notary public in and for said county and State, the within named J. S. Neely, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument.

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"Witness my hand and official seal at Middleton, Tenn., this 23d day of April, 1907.

"M. WILSON, Notary Public."

It will be observed that the words "for the purposes therein contained," required by the statutory form of certificate, are omitted, and this fact is explained by the notary, who testifies that he marked out these words for the reason that Dr. Neely had never acknowledged the instrument for the purposes therein contained.

It will be further noticed that this instrument of extension contains no description of the land, and the proof is that at the time it was signed by Dr. Neely it was on a separate slip of paper, and not attached to the original contract for the sale of the white oak timber by Dr. Neely to W. E. Small. It is also in proof that, at the time this alleged extension was acknowledged, the original conveyance to Small of the white oak timber had not been assigned by Small to Wm. Coleman Company and none of these papers had been offered for registration. It appears, however, that afterwards these separate papers were pasted together, and, together with the notarial certificate of acknowledgment, were recorded in the register's office of Harde-man county.

Counsel for appellee, in answer to the two assignments of error already stated, says:

"(1) The alleged extension of two years was never in fact executed by Dr. Neely, and there was no consideration for it.

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"(2) Both the assignments of Small to Coleman Company and the alleged extension of time are void under the statute of frauds.

"(3) All three of the instruments relied on by the defendants are lacking in any proper words of conveyance, and are insufficient and void as conveyances.

"(4) All of said instruments are insufficient under the laws relating to the acknowledgment of instruments of conveyances; none of them having a sufficient certificate of acknowledgment.

"(5) Said instruments were not entitled to registration and could not constitute constructive notice to Childers.

"(6) E. J. Childers was an innocent purchaser for value and without notice, either constructive or actual, of any of the instruments relied on by the defendants."

It has already been seen that the conveyance of the white oak timber from J. S. Neely to W. E. Small, dated March 7, 1904, and under which the William Coleman Company claims by assignment, provides on its face a three-year limit for the removal of the timber, and this time limit expired March 7, 1907, six months prior to the conveyance of the land by J. S. Neely to complainant, Childers, on October 3, 1907; but the defendant Coleman Company relies on an extension of two years to the original time limit, granted by J. S. Neely, July 12, 1906, which contention, if established, would carry the time limit for the removal of the timber beyond the time of the purchase of the land by complainant,

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Childers. As a matter of fact, we are satisfied from an examination of the record that no such extension was granted by J. S. Neely. While there is some evidence to the contrary, the great preponderance of the evidence overthrows this contention. We think there is no doubt of the right of Childers to make this question in the present controversy, since it vitally affects his title to the property. In *Iron Co. v. Iron Co.*, 58 Tenn., 434, this question was reserved upon the ground that the purchaser of the property had notice, but in the present case, as we shall see, the purchaser had no notice of the prior incumbrance, actual or constructive. The assignment from W. E. Small to Wm. Coleman Company was not acknowledged at all, and was not, therefore, entitled to registration. It has already been observed that in the notarial certificate to the alleged "extension of time" conveyance, the phrase "for the purposes therein contained" is entirely omitted. This was purposely done, as we have seen from the evidence of the notary already quoted.

It has frequently been held by this court that the omission of this language from the certificate of the notary is fatal to the registration of the instrument. *Currie v. Kerr*, 79 Tenn., 138; *Hughes v. Powers*, 99 Tenn., 485, 42 S. W., 1; *McGuire v. Gallagher*, 95 Tenn., 355, 32 S. W., 209; *Ellett v. Richardson & Co.*, 68 Tenn., 295.

These instruments, providing for the assignment of a contract for the sale of growing trees and an exten-

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sion of the time limit for the removal thereof, transferred an interest in land, and under our statutes were required to be registered.

In *Ives v. Atlantic, etc., R. R. Co.*, 142 N. C., 131, 55 S. E., 74, 115 Am. St. Rep., 732, it is said:

"It may now be taken as settled that growing trees are a part of the realty and a contract to sell or convey them, or any interest in or concerning them, must be reduced to writing. They are '*fructus naturales*,' and, being rooted in the soil, are by nature as much annexed to the freehold as any permanent fixture can be"—citing authorities.

This case is reported in 9 Am. and Eng. Ann. Cases, followed by an elaborate note of the editor, in which all the cases are collected, and the result was stated to be that the rule laid down in the reported case, to the effect that growing trees are a part of the realty, and that consequently a contract for the sale of standing timber is within the meaning and intent of the statute of frauds, and must be evidenced by a writing, has the support of the decided weight of authority. This question was considered by Judge Cooper in the case of *Knox v. Haralson*, 2 Tenn. Ch., 232, wherein it was held that a sale of so many cords of wood now standing in the tree is within the statute of frauds and must be in writing.

An exception to the general rule is found in the case of *Iron Co. v. Iron Co.*, 58 Tenn., 441, where it appeared the contract was for a sale of timber at ten cents per

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cord, to be paid for as fast as used. The court held that this was a sale of personalty, for the reason:

"The property did not pass in the timber until it should be used or received by the purchaser—at any rate, not until cut and corded up, as it was to be paid for by the cord, as used."

In the case of *Dorris v. King* (Tenn. Ch. App.), 54 S. W., 683, there was a contract for the delivery of timber by the vendor at the mill, already cut, and, following the case of *Iron Co. v. Iron Co.*, supra, the court of chancery appeals properly held the contract was not within the statute of frauds. In the note to *Ives v. Atlantic, etc., R. R. Co.*, 9 Am. & Eng. Ann. Cas., 188, the editor, in speaking of this exception to the general rule, says:

"In several jurisdictions, which recognize the general rule, it has been held that there may be a valid parol contract for the sale of timber as a chattel, where it is to be cut and delivered by the vendor, although it is designated as standing upon certain lands, since in such case the contract does not contemplate that the vendee shall have any property in the trees until after they have been actually cut down and removed."

And citing, among other cases, *Dorris v. King*, supra, and *Iron Co. v. Iron Co.*, supra, the editor further states:

"That such a contract is not a contract for the sale of trees in their standing condition, but rather a contract whereby the vendor agrees to bestow work and

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labor upon his own material, and deliver it in its changed condition to the plaintiff."

In Tiffany on Real Property, secs. 228, it is said:

"A sale of growing trees, or of other growths of a semipermanent character, such as grass or fruit growing on trees, is, by the weight of authority, *prima facie* a sale of an interest in land, and consequently it must be in writing under the fourth section of the statute of frauds; and so it has been held that a mortgage or sale of standing timber must comply with the same requirements as if it were of the land itself. If, however, the title is not to pass until the products have been severed from the soil, as when one contracts to sell lumber to be cut, the contract is for the sale of goods."

In Beach on Contracts, sec. 540, the rule is thus stated:

"Contracts for the sale of grass and growing trees have been held to concern an interest in land. The word 'land,' in its legal signification, embraces more than the word literally imports. It is a comprehensive term, and includes standing trees, buildings, fences, stones, and waters, as well as the earth, and all pass under the general description of land in a deed. Standing trees pass to the heir as a part of the inheritance, and not to the executor as emblements or chattels. For this reason it has been usually held that a sale of growing trees, with a right at any future time, whether fixed or indefinite to enter upon the land and remove them, conveys an interest in the land; but, when severed from

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the freehold, it is settled learning that they become chattels."

It may be observed that, if the conveyance extending the time be considered as a lease, it would be within the statute of frauds, and good for only one year. So, if it be viewed as creating an irrevocable license to enter, this is in the nature of an easement, and must be in writing. *Nunnally v. Iron Co.*, 94 Tenn., 397, 29 S. W., 361, 28 L. R. A., 421.

It follows, therefore, that, since these conveyances transferred an interest in realty, they were required to be registered; but since there was no acknowledgment at all to one of the instruments, and a fatally defective notarial certificate to the other, neither was entitled to registration, and therefore such a registration would not fix constructive notice on any one dealing with said property. The record also shows that complainant, Childers, had no actual notice of the original contract between Neely and Small, or of its assignment to the William Coleman Company, or of the alleged extension of the time limit. We are satisfied that Childers was an innocent purchaser for value of this property, without notice, actual or constructive, of any prior incumbrances or equities, and that he is entitled to a decree for this land, and for damages for the unlawful cutting of his timber. The decree of the chancellor will be in all respects affirmed.

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ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *et al.* v.
JAKE FINLEY.

(*Jackson*. April Term, 1909.)

1. **PERSONAL INJURIES.** Evidence stated and held to warrant peremptory instructions for verdict for defendant.

The evidence in an action by a railroad employee against the railroad company for personal injuries is stated, reviewed, and held to warrant the granting of a motion for peremptory instructions for a verdict in favor of the defendant, because there was no proof of negligence upon the part of the defendant. (*Post*, pp. 131-133.)

2. **SAME.** Failure to introduce certain witnesses raises no presumptions of fact, when.

Where the plaintiff in an action against a railroad company for personal injuries fails to make out his case, it is not incumbent upon the defendant to introduce any evidence; and therefore no presumption of fact arises from the failure of the defendant to cause certain witnesses of the accident to testify. (*Post*, p. 133.)

3. **SAME.** Action for personal injuries received in another State must be tried upon common law principles, where no statute is shown.

Where, in an action against a railroad company for personal injuries resulting from an accident occurring in another State, and there is no averment and proof of the existence of any statute in that State similar to our statute upon the subject of obstructions upon railroad tracks, the case will be considered upon the principles of the common law. (*Post*, p. 133.)

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4. STATUTORY PRECAUTIONS TO PREVENT ACCIDENTS ON RAILROADS. Declaratory of the common law except as to burden of proof and absolute liability.

The statute for the prevention of accidents upon railroads is simply declaratory of the common law duties of railroad companies, except in respect of the burden of proof and the absolute liability imposed upon railroad companies for their failure to observe the prescribed precautions. (*Post*, pp. 133, 134.)

Cases cited and approved: *Horne v. Railroad*, 1 Cold., 72, '74-76; *Railroad v. Fugett*, 3 Cold., 402, 404; *Railroad v. Smith*, 6 Helsk., 174, 176; *Burke v. Railroad*, 7 Helsk., 451, 463; *Railroad v. Connor*, 9 Helsk., 19, 21, 22, 23; *Railroad v. Humphreys*, 12 Lea, 206; *Railroad v. Fleming*, 14 Lea, 139; *Railroad v. Pratt*, 85 Tenn., 9, 13, 14, 15; *Patton v. Railroad*, 89 Tenn., 370, 377, 378; *Railroad v. Wilson*, 90 Tenn., 274, 275; *Rapid Transit Co. v. Walton*, 105 Tenn., 416, 422, 423.

5. SAME. Do not apply to railroad employees on the track in the discharge of their duties.

The statutory requirements for the prevention of accidents on railroads do not apply to the employees of the railroad company while upon its track in the discharge of their duties. (*Post*, p. 134.)

Cases cited and approved: *Railroad v. Burke*, 6 Cold., 45; *Railroad v. Robertson*, 9 Helsk., 276; *Haley v. Railroad*, 7 Baxt., 239; *Railroad v. Rush*, 15 Lea, 145; *Railroad v. Hicks*, 89 Tenn., 301; *Taylor v. Railroad*, 93 Tenn., 305; *Railroad v. Holland*, 117 Tenn., 257.

6. RAILROADS. Common law applies to employees on the track; duty of brakeman to look and listen when sent to flag a train.

It is the duty of a brakeman, under duty to go forward and flag an expected train, to look and listen continuously so long as he is upon the track, and his failure to do so constitutes such contributory negligence on his part as will defeat his action for the negligence of the crew of the approaching train, unless they see him and can prevent the accident, but fail to do so.

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These principles are applicable under the common law. (*Post*, pp. 134, 135.)

Cases cited and approved: Railroad v. Rush, 15 Lea, 145; Railroad v. Hicks, 89 Tenn., 301; Taylor v. Railroad, 93 Tenn., 305.

7. **SAME.** Same. Presumption that brakeman will be alert and watchful in flagging train.

The crew of the approaching train have the right to assume that the brakeman sent out to warn and signal the train will not go to sleep upon the track, but, on the contrary, that he will be alert and watchful in the discharge of his duties. (*Post*, p. 135.)

8. **SAME.** Duty of train crew to prevent accident to brakeman asleep on the track or dangerously near it.

Where such brakeman falls asleep on the track, or so near thereto as to be within the sweep of the train, it is the duty of such train crew to make every effort in their power to stop the train and prevent the accident, if they discover his peril. An avoidable injury inflicted after such discovery would be wanton and inexcusable. (*Post*, pp. 134, 135.)

9. **SAME.** Same. Brakeman on track cannot justly complain of the absence of a lookout, when.

Where such brakeman goes to sleep on the track, he cannot complain that such train crew were also negligent in failing to keep a proper lookout. He is bound to know that no one upon the approaching train could contemplate him as having abandoned his duty, and exposed himself to imminent and known danger by going to sleep upon the track, or so near to it as to be struck by the train. (*Post*, p. 135.)

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FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.

BELL, TERRY, ANDERSON & BELL, for Railroad.

C. H. TRIMBLE, for Finley.

PER CURIAM.

This action was brought in the circuit court of Shelby county to recover damages for an injury inflicted upon the defendant in error by plaintiff in error's railroad train, of which Forsyth was engineer, in the State of Mississippi. There was a demurrer, and judgment in the court below for \$2,500, from which the plaintiff in error appealed to the court of civil appeals, and there the judgment was affirmed. A petition has been filed by the plaintiff in error in this court for the writ of *certiorari* to bring the case here for trial.

We have examined the case with care, and are convinced that both the circuit court and the court of civil appeals committed error, and the judgment rendered by each of them must be reversed.

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Only one witness testified, the defendant in error himself. He says that he had left Memphis on the previous night about 7:30 on one of plaintiff in error's trains, and had, with the train, reached, about daylight, or nearly daylight, a station known as Plantersville, in the State of Mississippi. There the train stopped for the purpose of meeting the north bound passenger train. He testified that his train was under orders to wait at that point for the passenger train, and that he was ordered by the conductor to go forward and notify the passenger train that the freight train was so heavy that it could not go in on the side track, which was down-grade, with any expectation of getting out again, and therefore that the passenger train must take the siding; that his duty under these orders was to go down with his red light, and his white light, and with torpedoes, and after lining up the switch, to place the torpedoes upon the track, and then retire further up the track, and, when he saw the passenger train coming, to signal to it with his red light, and then with his white light, and when the train should be stopped, he was to go down and get on the engine, and let the engineer know what he was to do; that is, to go in upon the siding. He testified that he did line up the switch, and went some ten or twelve telegraph poles down the track, and put out his torpedoes, and came back two or three telegraph poles to the switch, and set his red light and white light on the track. He says then: "I didn't feel sleepy. I sat on the end of the cross-ties and went to

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whittling with my knife, about fifteen or twenty feet behind by lantern, and I dropped off to sleep, and that's the last I remember. . . . I was down on the end of the cross-ties, looking up the track the way the train was coming. . . . The next thing I remember after that, my arm was mashed up. Q. Where were you? A. I was at Plantersville. Q. Did anybody have you at the time you waked up? A. Mr. Forsyth had hold of me on one side, and I don't know who the other fellow was—a passenger off the train. Q. Is that the first you remember, some men had you? A. Yes, sir. Q. What time, about, was it that these men had you there, and your arm was cut off, and you waked up? A. I don't know the exact hour, but just about sunrise, I suppose." Cross-examination: "You sat down on the tie? A. Yes, sir. Q. How did your arm happen to get run over? A. How did it happen to get run over? Q. Yes. A. I don't know, sir. All I know the engine run over it. I was setting down on the end of the tie with my head on my hand, and before I knew anything it was mashed. Q. You were on the north side of the track? A. On the north side of the track."

This was all of the evidence upon the subject of how the accident occurred. There was a motion entered in the court below for a peremptory instruction in favor of the defendant. We think it should have been granted. It is impossible to say from this evidence, or to conjecture, when the defendant in error's arm fell upon the track. It may have been lying upon the track some-

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time before the passenger train approached, or it may have fallen across the track immediately in front of the passenger train, too late for the engineer to see it, or to do anything towards preventing the accident. It does not appear that the defendant in error's body was close enough to the train to be struck; only his arm was crushed. As stated, it is impossible to say from this evidence that the employees on the passenger train were guilty of any sort of negligence. It was not incumbent upon the railway company to introduce evidence to show anything upon the subject since the defendant below stopped short of making a case. Therefore no presumption of fact could arise from the failure of the engineer to testify, or from the failure of any employees to testify.

In addition to the view just stated, if we could assume from this evidence that the defendant in error had his arm lying upon the track at the time, and before, the passenger train approached, still he would not be entitled to recover. There is no averment or proof of the existence of any statute in Mississippi, similar to our statute, upon the subject of obstructions upon railroad tracks. Our cases, however, hold that the statutory provisions above referred to are but declaratory of common-law duties, except in respect of the burden of proof and the absolute liability imposed for failure to use the precautions referred to. *Railroad v. Wilson*, 90 Tenn., 274, 275, 16 S. W., 613, 13 L. R. A., 364, 25 Am. St. Rep., 693; *Railroad v. Fleming*, 14 Lea, 139; Rail-

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road v. Humphreys, 12 Lea, 206; *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn., 416, 422, 423, 58 S. W., 737; *Patton v. Railroad*, 89 Tenn., 370, 377, 378, 15 S. W., 919, 12 L. R. A., 184; *Railroad v. Pratt*, 85 Tenn., 9, 13, 14, 15, 1 S. W., 618; *Railroad v. Connor*, 9 Heisk., 19, 21, 22, 23; *Burke v. Railroad*, 7 Heisk., 451, 463, 19 Am. Rep., 618; *Railroad v. Smith*, 6 Heisk., 174, 176; *Railroad v. Fugett*, 3 Cold., 402, 404; *Horne v. Railroad Co.*, 1 Cold., 72, 74-76. But it is also held that these requirements do not apply to the employees of the railroad company upon its track in the discharge of their duties. *Railroad v. Holland*, 117 Tenn., 257, 96 S. W., 758; *Taylor v. Railroad Co.*, 93 Tenn., 305, 27 S. W., 663; *Railroad v. Hicks*, 89 Tenn., 301, 17 S. W., 1036; *Railroad v. Rush*, 15 Lea, 145; *Railroad v. Robertson*, 9 Heisk., 276; *Haley v. M. & O. Railroad*, 7 Baxt., 239; *Railroad v. Burke*, 6 Cold., 45. It has been specifically held that they do not apply to the case of a brakeman, who, while under the duty to go forward and flag an expected train, after setting his white and red lights upon the track, sits down upon the end of a cross-tie and goes to sleep in such a position as to be struck by the train which he was sent out to warn. *Railroad v. Rush*, supra. It is the duty of an employee having such commission to discharge to look and listen continuously so long as he is upon the track, and his failure to do so would constitute such contributory negligence on his part as would defeat his action for any negligence of the crew of the approaching train, unless they saw him on

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the track, and could have prevented the accident, and failed to do so. *Taylor v. Railroad*, supra; *Railroad v. Hicks*, supra. These principles are applicable under the common law. The servants of the railroad company in the conduct of an approaching train have the right to assume that a brakeman sent out to warn and signal the train will not go to sleep upon the track, but, on the contrary, that he will be alert and watchful in the discharge of his duties. However, if he should fall asleep upon the track, or negligently sit so near the track as to be within the sweep of the passing train, and there go to sleep, it would be the duty of the company's servant's upon the advancing train to make every effort in their power to stop the train and prevent the accident, if they should discover his peril. An injury inflicted after such discovery would be wanton and inexcusable. When an employee, however, sent out to warn and stop an expected train, so far forgets his duty as to go to sleep upon the track, he cannot justly complain that the servants of the company on the train referred to were also negligent in failing to keep a proper lookout. He is bound to know that no one upon the approaching train could contemplate him as having abandoned his duty, and exposed himself to imminent and known danger by going to sleep upon the track, or so near it as to be struck by the train. We do not think this case is one for the application of what is called the "last clear chance doctrine," discussed in the opinion of the court

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of civil appeals, and we express no opinion upon the merits of that doctrine.

We have not in this case applied the rule applicable to the negligence of fellow servants, since the declaration pleads and relies upon a statute of the State of Mississippi, where the accident occurred, which relieves the defendant in error of the disabilities arising out of such relation.

On the ground stated, the judgment of the circuit court and of the court of civil appeals must be reversed, and the suit dismissed, with the costs of this court and of the court below.

Fritz v. Sims.

LOUIS FRITZ v. W. R. SIMS.

(*Jackson*. April Term, 1909.)

1. **INJUNCTION.** Chancery has no jurisdiction to enjoin criminal prosecutions.

The chancery court has no jurisdiction to enjoin criminal prosecutions.

Case cited and approved: *Sawyer*, Ex parte, 124 U. S., 200.

2. **SAME.** Same. Owner of lake is not entitled to injunction against further prosecutions for alleged violation of statute for protection of fish.

The complainant, claiming to be the owner of a lake, is not entitled to an injunction against an assistant game warden to prevent annoyance from further threatened arrests and prosecutions for fishing in such lake, upon the ground alleged by said officer that such fishing therein is in violation of the statute (Acts 1907, ch. 489) for the protection of fish.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
F. H. HEISKELL, Chancellor.

RANDOLPH & RANDOLPH, for complainant.

A. H. MURRAY, for defendant.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The complainant, claiming to be the owner, by grants from the State, of the body of land upon which are the waters of North Horn Lake, as well as the land surrounding these waters, filed the bill in this cause, charging that the defendant, who is an assistant game warden, assuming to act under the authority of chapter 489, p. 1649, of the session Acts of 1907, had arrested him for alleged violations of the terms of that act, and was threatening him with further arrests upon continued violation of the same, and asking that the defendant be perpetually enjoined from such an interference with the complainant.

It will thus be seen that the chief, and in fact the only, purpose of the complainant, in the institution of this suit, was to obtain relief by injunction from the annoyance of further prosecutions for assumed violations of the act in question. That the chancery court is without jurisdiction to grant such relief, we think, is well settled by the authorities. 2 Story, Eq. Juris., section 893; 3 Pomeroy, Eq., section 1361, note; 22 Cyc., 903; 16 Am. and Eng. Ency. of Law, 370. As is said in the text of the work last above cited: "At one time the court of chancery in England exercised a jurisdiction partaking of a criminal character, but it was not without objection and protest from the Commons and the common-law court. It was excused, rather than justified, because of the inability of other tribunals to

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maintain internal peace and order, and because it was exercised for the defense of the poor and helpless. It passed away when the necessity of its exercise ceased, and the common-law tribunals were restored to power sufficient for the suppression of violence and wrong. It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violations of statutes or for an infraction of municipal ordinances." In the text of this work many illustrations, taken from the reports of the supreme court of the United States, as well as the courts of last resort of many of the States, and of the English courts, are given of the application of this rule.

One of the cases there referred to is that of *Ex parte Sawyer*, 124 U. S., 200, 8 Sup. Ct., 482, 31 L. Ed., 402. In the opinion in that case it is said that "under the constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. . . . The office and jurisdiction of the court of equity, unless enlarged by an express statute, are limited to the protection of rights and property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdic-

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tion, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of the common law. . . ." The principle thus laid down is fortified by a reference to many cases, which had arisen both in American and English courts. The chancellor evidently recognized and applied it in the disposition of this case, and his decree dismissing complainant's bill is on this ground affirmed.

Elks v. Elks.

**BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE
UNITED STATES OF AMERICA *et al.* v. IMPROVED BEN-
EVOLENT AND PROTECTIVE ORDER OF ELKS OF THE
WORLD.**

(Jackson. April Term, 1909.)

CORPORATIONS. Prior corporation is entitled to injunction against the use of a similar name by a subsequent corporation, when.

A corporation chartered, in the year 1868, under the name of the "Benevolent and Protective Order of Elks of the United States of America," not engaged in commercial business, but employing certain business activities, and maintaining certain business institutions, clubhouses, a home for the aged and invalid members, and engaged in conducting charities and supplying amusements for its members, who are all white persons, has acquired such valuable rights, financial, business, and social value in its said name, in the nature of a trade-name, that it is entitled to an injunction restraining a subsequently chartered corporation, composed of colored people, and organized for similar purposes, from using its charter name of "Improved Benevolent and Protective Order of Elks of the World," and also from using complainant's badge, emblems, ritual, passwords, etc.

Cases cited and approved: *Society v. Society*, 1 Tenn. Chy., 97; and numerous cases in other States, on pages 146 and 147 of the opinion.

Elks v. Elks.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court. F. H. HEISKELL, Chancellor.

J. N. ESTES, for complainants.

THOS. M. SCRUGGS and B. F. BOOTH, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The complainant alleged in its bill that it was a corporation chartered under the name of "Benevolent and Protective Order of Elks of the United States of America," and that its members were generally known over the United States as the "Elks;" that the defendant was subsequently chartered under the name of the "Improved Benevolent and Protective Order of Elks of the World;" that the similarity of the two names has not only produced confusion in the operations of the two bodies, but, in the nature of things, will continue to cause confusion, in the fact that mail intended for the one will be delivered to the other, that the membership

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of the one will be confounded in the public mind with the membership of the other, likewise the enterprises whereby money is raised for charitable purposes, such as baseball games, theatrical entertainments, etc., which require advertisement and public patronage; that thereby the complainant will be greatly depleted and deteriorated in its membership, which will cause large financial losses, since extensive revenues are derived from this source. It is shown in the bill that, while complainant is not technically engaged in business, it owns property worth \$9,000,000, has an annual income of \$4,000,000 and yearly dispenses in charity \$500,000. It also appears from the bill that the complainant owns clubhouses in which its members are entertained; also that it maintains a home for its aged and invalid members, wherein they are cared for in comfort and happiness. It is alleged, as above indicated, that it conducts enterprises of a business nature from time to time for the purpose of raising money to expend in charity, not only upon its own members, but upon worthy objects outside of the order. It appears that the organization, from a small beginning in 1868, has grown to a membership of more than 225,000 in the United States, composed only of white persons, citizens of the United States, within prescribed age limits. It was alleged in the bill that defendant had not only appropriated complainant's name in substance, but had also copied its ritual and its badge, the latter being very distinctive, bearing an elk's head with antlers spread.

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The bill was filed in the name of the complainant, Benevolent and Protective Order of Elks of the United States of America, through a committee appointed by the Grand Lodge, the governing body of the order, and was also joined in by Memphis Lodge, No. 27, likewise a corporation; this local body having a membership of more than 800.

There was a prayer for an injunction to prevent the use of the name "Improved Benevolent and Protective Order of Elks of the World;" also the use of complainant's badge, emblems, ritual, passwords, etc.

A demurrer was filed, making the point that the rights asserted in the bill were not property rights, and that the wrongs complained of were not such as a court of equity would protect by injunction. The demurrer was overruled, and thereupon the defendant filed its answer.

The answer admitted that the defendant was chartered and organized under the name charged in the bill, but denied that it was using the ritual, passwords, badges, or emblems of the complainant, or that there was any danger of the two orders being mistaken for each other, and relied particularly upon the fact that the members of defendant were colored people, while the members of the complainant were white people.

Upon the hearing the chancellor sustained the bill and decreed a perpetual injunction. From this decree the defendant prayed an appeal to the court of civil appeals, where the decree was affirmed. The defendant has now filed a petition, asking that the cause be re-

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moved to this court by the writ of *certiorari*. In the petition the evidence is not referred to; but the case of complainant is put upon the allegations of the bill, and we shall so treat the case. However, we may add that the evidence sustains the substance of the bill, and also sustains the averment of the answer that the defendant order is composed of colored people.

We are of the opinion that the injunction was properly awarded and made perpetual. While the complainant was not engaged in business for profit, in the sense of commerce and trade, yet it employed certain business activities for the purpose of maintaining itself and to procure funds to carry out the purpose of its organization, and it maintained certain business institutions, its clubhouses, and its home for aged and invalid members. The name it had acquired and appropriated had become very valuable, in the nature of a trade-name, by which it was accustomed to appeal to the public, and on the faith and reputation of which it was accustomed to obtain and receive from the public large sums of money. The name of the defendant is so similar that in the nature of things it will cause the one order to be mistaken for the other, and the enterprises of each to be confused with those of the other. The fact that the defendant's membership is composed of colored people will not materially change the result. In addition to the close similarity in the names, if a badge the same in appearance as that of complainant be worn by one of defendant's members, the inference is bound to be immediate

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in the public mind that the membership is the same. Few will take the trouble to inquire, or have the means of inquiring, whether such person is a member of complainant organization or of a different organization. This confusion of the two orders will, as shown in the record, result in great financial detriment to the complainant. The complainant first used the name, and gave to it the great financial, business, and social value which is now attached to it, to say nothing of the fact that complainant is a prior corporation, which is entitled to have its corporate name protected. Under the facts stated, we think the complainants were entitled to the relief sought in the bill. *Ladies' Good Samaritan Society of Nashville v. Nashville Ladies' Good Samaritan Society*, 1 Tenn. Ch., 97; *International Committee of Young Women's Christian Association v. Young Women's Christian Association of Chicago*, 194 Ill., 194, 62 N. E., 551, 56 L. R. A., 888; *Rickard v. Caton College Co.*, 88 Minn., 242, 92 N. W., 958; *Merchants' Detective Ass'n v. Detective Agency*, 25 Ill. App., 250; *Nokes v. Mueller*, 72 Ill. App., 431; *International Soc. v. International Soc. (Sup.)*, 59 N. Y. Supp., 785; *Woodward v. Lazar*, 21 Cal., 449, 82 Am. Dec., 751; *Marsh v. Billings*, 7 Cush. (Mass.), 322, 54 Am. Dec., 723; *Devlin v. Devlin*, 69 N. Y., 212, 25 Am. Rep., 173; *Hopkins Amusement Co. v. Frohman*, 103 Ill. App., 613, Id., 202 Ill., 541, 67 N. E., 391; *Gamble v. Stephenson*, 10 Mo. App., 581; *Red Polled Cattle Club of America v. Red Polled Cattle Club*, 108 Iowa, 105, 78 N. W., 803;

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Atlas Assurance Co., Limited, v. Atlas Assurance Co.
(Iowa), 112 N. W., 232, 15 L. R. A. (N. S.), 625.

The application for *certiorari* will therefore be refused.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1909.

J. I. CASE THRESHING MACHINE COMPANY *v.* PRYER L.
WATSON, Admr., *et al.*
(*Knoxville*. September Term, 1909.)

1. **CONDITIONAL SALES.** Nonresident seller must advertise sale by printed handbills, or sale will be rescinded.

The duty imposed by statute (Acts 1889, ch. 81, sec. 1) upon the seller in a conditional sale of personalty to advertise the property for sale upon regaining possession after the buyer's default, is absolute, and the failure of such nonresident seller to advertise by printed handbills invalidates the sale, and in effect rescinds the contract, so that the seller cannot recover the balance of the purchase price after crediting the amount realized by the sale. The reclaiming creditor's noncompliance with the statute as to advertisement of the sale is ineffectual to place any further burden upon the conditional vendee. (*Post*, pp. 152, 153, 156.)

Acts cited and construed: Acts 1889, ch. 81, secs. 1 and 4.

Cases cited and approved: Furniture Co. v. Boon, 102 Tenn., 719.

2. **SAME.** Same. Statute provides for advertisements by printed handbills by nonresident seller, and by written or printed notices to be posted by resident seller.

The statute (Acts 1889, ch. 81, sec. 1) providing that the seller in a conditional sale of personalty, upon regaining possession

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of the property after the buyer's default, shall, within ten days thereafter, advertise it for sale by printed handbills, or written or printed notices posted on the door of the courthouse in the county in which the seller resides, and also at two public places in the civil district in which the purchaser resides, provides two modes of advertising the sale, one by printed handbills, applicable where the seller resides in another State or in county other than that in which the purchaser resides, and the other by posting written or printed notices on the courthouse door, and also at two public places in the civil district in which the purchaser resides, applicable where the seller and purchaser live in the same county in this State; and a nonresident seller cannot give notice of a sale in the buyer's county in this State by posting notice, but must give notice by printed handbills. (*Post*, pp. 153, 154, 155, 156.)

Acts cited and construed: Acts 1889, ch. 81, sec. 1.

3. **SAME.** "Printed handbills" for advertising the sale are defined.

The "printed handbills" for advertising the sale of reclaimed property under conditional sales of personalty are printed notices of such sale, giving the time, place, and terms thereof, with a description of the property to be sold, distributed by hand, with reasonable diligence and good faith, among persons living in the neighborhood where the property is, and the sale is to take place. (*Post*, p. 155.)

-- Acts cited and construed: Acts 1889, ch. 81, sec. 1.

4. **SAME.** Advertisement posted on courthouse door in county of nonresident seller would be an absurdity.

The statute (Acts 1889, ch. 81, sec. 1) prescribing the mode of advertisement of the sale of the reclaimed property under a conditional sale thereof, when properly construed, does not require the seller who is a nonresident of the county or State in which the purchaser lives to post a notice of the sale on the door of the courthouse of the county in which the seller resides. Such a requirement would involve an absurd, foolish, and unnecessary act amounting to an idle ceremony. (*Post*, pp. 153-155, 156.)

Acts cited and construed: Acts 1889, ch. 81, sec. 1.

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5. STATUTES. Construed to give effect to the whole, without absurdities.

A statute should be construed so as to give effect to every part of it, and at the same time avoid absurd conditions. (*Post*, pp. 156, 157.)

6. SAME. Where the disjunctive conjunction "or" is interpreted as used to indicate alternative conditions, a comma may be inserted after the preceding word.

The word "or" occurring in the conditional sales statute (Acts 1889, ch. 81, sec. 1) providing that a conditional seller, on regaining possession upon the buyer's default, shall advertise the property for sale "by printed handbills or written or printed notices," etc., is used as a disjunctive conjunction in its ordinary meaning to indicate an alternative; and the court, in interpreting the statute, may properly insert a comma after the preceding quoted word "handbills." (*Post*, pp. 154, 156-158.)

Acts cited and construed: Acts 1889, ch. 81, sec. 1.

Cases cited and approved: *Whitesides v. State*, 4 Cold., 175; *McBride v. McBride*, 111 Tenn., 616; *Kuehner v. Freeport*, 143 Ill., 92; *Caster v. McClellan*, 132 Iowa, 502.

7. CONDITIONAL SALES. Advertisement by printed handbills distributed a reasonable time before the sale, which may be ten days, when.

The conditional sales statute (Acts 1889, ch. 81, sec. 1) providing that a conditional seller, on regaining possession upon the buyer's default, shall advertise the property for sale by printed handbills, or written or printed notices posted at least ten days before the day of sale, etc., though permitting and requiring the resident seller's advertisement of the sale to be by written or printed notices posted for ten days before the sale, and the nonresident seller's advertisement to be by printed handbills distributed, without fixing the time before the sale for the distribution of the printed handbills, requires the seller, when permitted to advertise by printed handbills, to distribute the same a reasonable time before the sale, which may probably be the same time as in the other mode, namely, ten days. (*Post*, pp. 153, 154, 158.)

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FROM MONROE.

Appeal from the Chancery Court of Monroe County.
T. M. McCONNELL, Chancellor.

YOUNG & YOUNG, for complainant.

MCCROSKEY & PEASE, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The bill in this cause was filed to recover a balance alleged to be due on notes executed by one William Donahoo to the complainant company as the purchase price of machinery contracted and delivered by the complainant to him. To secure the payment of these notes, the title to the machinery was retained by the vendor. The purchaser having died, the defendant P. L. Watson was appointed administrator of his estate. Upon the ground that his intestate, for just reasons, had abandoned the contract, he declined to recognize these notes as claims against the estate. Thereupon the complainant took possession of the machinery and made sale of the same. Failing to realize the full amount of the purchase-money notes at this sale, which, it is alleged, was made "under and in accordance with the act of the State of Tennessee of the year 1899, chapter 81, regulating conditional sales of personalty," this suit was instituted for the purpose stated above.

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A number of defenses were set up in the answer of the administrator, among them being a denial that complainant had complied with the statute in question.

On this point the record shows that, immediately after taking possession of the property, it was advertised by the complainant for sale by printed posters that were put up in the civil district within which Donahoo lived and died, and where, also, his administrator lived; one of them being placed on the courthouse door in the town of Madisonville, located within that civil district, and others in public places in other parts of Monroe county, where the machinery was. It is insisted that in this there was a failure to comply with the requirement of the statute referred to.

Upon regaining possession of property by a vendor in a conditional sale, because of the failure of the vendee to pay the full purchase money, as provided in the contract of sale, "the statutory duty of within ten days thereafter advertising the same for sale in the manner prescribed by the act is imperative, and a failure to discharge this duty in any important particular makes the vendor so reclaiming liable to the original purchaser for the part of the consideration theretofore paid." *Whitelaw Furniture Co. v. Boon*, 102 Tenn., 719, 52 S. W., 155. It is true that no part of the purchase money in the case at bar was paid, and the particular question presented in this case just cited does not arise here; but the principle there announced is equally controlling.

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The insistence of the defendant on the point at issue is that no "notice of this sale was posted on the door of the courthouse of the county" where the "seller" resided, and that this being so, the sale was ineffectual to place any liability upon the estate of Donahoo, the deceased.

The conditional vendor in the present case is a corporation, with its *situs* at Racine, Wis. To have posted notice of this sale on the courthouse door at that point would have been an idle ceremony. We are confident that the legislature never contemplated that where a nonresident vendor made a conditional sale of personalty to a conditional vendee in this State, and then reclaimed the property because of the failure of the latter to comply with the terms of the purchase, in order to make a perfect sale under the act of 1889, notice of the same should be posted at the courthouse of the vendor. Such a requirement would be absurd. The provision as to the duty of the reclaiming vendor is found in section 1 of this act, which is in words as follows:

"That, hereafter, when any personal property is sold upon condition that the title remain in the seller until that part of the consideration remaining unpaid is paid, it shall be the duty of said seller, having regained possession of said property, because of the consideration remaining unpaid at maturity, to, within ten days after regaining said possession, advertise said property for sale, for cash to the highest bidder, by printed handbills, or written or printed notices, posted on the door

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of the courthouse of the county of which said seller resides; and also at two public places in the civil district in which said original purchaser resides (said notice to be posted at least ten days before the day of sale, and to contain a description of the property to be sold, and time and place of said sale), unless the debt is satisfied before the day of sale, then it shall be the duty of said original seller, or his agent, at the time and place, as stated in said notices, to offer for sale said property, as provided above. . . ."

This statute, though inartificially drawn, provides for two modes of giving notice by a reclaiming vendor, one by "printed handbills" and the other by posted notices, and we are satisfied contemplates two distinctly different cases, one that of a nonresident seller with a purchaser residing in this State, or a seller resident in a county in this State other than that in which the purchaser resides, and the other where the conditional vendor lives in the same county in this State with the conditional vendee. In the first of these cases, as has been indicated above, the posting of a notice at the courthouse door of the county of the vendor, residing in another State, or, in a county in this State other than that of the residence of the conditional vendee, would be idle and of no effect, so far as giving notice of the sale was concerned. To meet such case it therefore provides that notice of the sale may be given by "printed handbills." It is a matter of common knowledge what these are and the purpose they are to serve in the matter of a public

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sale. They are printed notices of such a sale, giving the time, place, and terms thereof, with a description of the property to be sold, distributed by hand, and it was the evident purpose of the legislature that this should be done with reasonable diligence and good faith among persons living in the neighborhood where the property is and the sale is to take place. When this is done, all opportunity for unfair dealing, as regards the purchaser, and unjust advantage of him is avoided.

The other class embraces the case of the conditional vendor who lives in the same county in this State with the conditional vendee, and the former chooses to make his sale in that county. In such a case the statute provides for the posting at the courthouse of the county, and also two public places in the civil district in which the purchaser lives. This method secures, not only notice to the vendee of the sale which was to take place, but gives publicity to his neighbors, so as to insure the utmost fairness in the sale advertised.

This section bears this construction, and it is only by adopting it that the legislature can be relieved of the charge of having required of the nonresident vendor, as in the present case, a foolish and unnecessary act. In either case, we are satisfied that the noncompliance upon the part of the reclaiming vendor, in any respect, with the requirements of the statute would be ineffectual to convey the property sold, and equally ineffectual to place any other or further burden upon the conditional vendee.

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In the present case the provision of the statute, for the benefit of the class to which the complainant belongs, was not availed of; but it saw proper to make advertisement under the other provision, with the result that, as a matter of law, no valid sale was made. In legal effect it was, as section 4 of the act has been construed, a rescission of the contract. This being so, the complainant was not entitled to maintain the present bill as against the administrator of the delinquent vendee.

It follows that the decree of the chancellor, in so far as it grants relief to the complainant, is reversed, and the bill is dismissed.

ON REHEARING.

Mr. CHIEF JUSTICE BEARD delivered the opinion of the Court.

A petition for rehearing in this case has been presented, in which it is insisted the court, in the opinion handed down, has changed the meaning of section 1, c. 81, p. 117, Acts 1889, invoked in the cause, by placing as is done, in the excerpt from the act, a comma after the words "printed handbills," when in the original there is no such mark of punctuation. It is conceded by counsel of the petitioner that, thus punctuated, the section "is subject to the interpretation that the advertisement may be made in either one of the two manners [modes?]; that is to say, by printed handbills, or written or printed notices, posted on the door of the courthouse."

That it should be construed so as to give effect to

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every part of the section, and at the same time avoid absurd conditions, is certainly true. In the effort to do this, the question raised in the petition for rehearing is: Has the court kept itself within sound canons of interpretation? While the disjunctive conjunction "or" is sometimes used in a sentence to connect synonyms, yet it is ordinarily employed in stating alternative subjects and ideas. Illustrations of these several uses are to be found in the standard works of grammarians and lexicographers. For instance, in the phrase, "The Prime Minister, or head of the British Cabinet," it evidently introduces a synonym, while in the sentence, "He may study law, or medicine or divinity, or may go into trade," it as clearly marks alternative conditions; and the section of the act under consideration equally illustrates the two distinct uses to which the particle may be applied. But, whether used in one form or the other, the best authorities recognize the comma preceding the particle as proper, if not essential, to bring out the the true meaning of the sentence.

Not only have grammarians and lexicographers defined the word "or" as ordinarily indicating an alternative, but the courts in many cases have adopted and applied this definition. *Kuehner v. Freeport*, 143 Ill., 92, 32 N. E., 372, 17 L. R. A., 774; *Caster v. McClellan*, 132 Iowa, 502, 109 N. W., 1020; *Whiteside v. State*, 4 Cold., 175; *McBride v. McBride*, 111 Tenn., 616, 69 S. W., 781.

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It was by giving the particle "or" its ordinary, and, as we think, its obvious, meaning, and then punctuating the clause, as approved by the best authorities, that the interpretation was reached, the soundness of which is complained of in this petition. It was assumed that, in the preparation of the act, by inadvertence or clerical omission the section was left by the draftsman to read as it is found published.

It is insisted, however, reading the section thus construed, no provision is made for the length of time before the sale that printed handbills announcing the same should be distributed. This is true; but, when the reclaiming seller is permitted to give notice in this form, the statute implies reasonable notice, and if he should undertake to make a mockery of this provision, by resorting to a trick or device which would be the equivalent of no notice, the courts, when applied to, would see that he, rather than the unfortunate purchaser, was the victim of the wrongdoing.

As is said in the opinion, in such case reasonable notice would be essential, and, while no fixed limitations can be given for this notice, it may, possibly, be properly inferable that the notice implied in the distribution of handbills would be the same as where notice is given in the other mode provided in the section.

Upon re-examination of the question, we are satisfied with the conclusion heretofore announced, and it is therefore adhered to.

The petition for rehearing is dismissed.

Bell v. Noe.

MRS. CATHERINE BELL v. J. C. NOE.

(*Knoxville*. September Term, 1909.)

1. **COURT OF CIVIL APPEALS.** Has exclusive appellate jurisdiction in suit to assert right to homestead which is not an ejectment suit.

A bill in chancery to assert complainant's right to a homestead in certain described land is not an ejectment suit, and as the homestead estate cannot exceed one thousand dollars in value, the appellate jurisdiction is exclusively in the court of civil appeals, and not in the supreme court.

Acts cited and construed: Acts 1907, ch. 82, sec. 7.

2. **SAME.** Supreme court will transfer causes to it where it has the appellate jurisdiction.

Where the appellate jurisdiction is exclusively in the court of civil appeals, and the cause is erroneously appealed to the supreme court, the same will be transferred by the supreme court to the court of civil appeals.

Acts applied, though not cited: Acts 1909, ch. 192.

FROM HAMBLEN.

Appeal from the Chancery Court of Hamblen County.
HUGH G. KYLE, Chancellor.

PARK & PARK, for complainant.

MCCANLESS & TATE, for defendant.

Bell v. Noe.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in this case, as finally amended, seeks only to assert complainant's right to a homestead in certain land described. This estate cannot exceed \$1,000 in value. The appellate jurisdiction is therefore exclusively in the court of civil appeals. Acts 1907, p. 233, c. 82, sec. 7. This is not an ejectment suit.

An order will be entered directing the transfer of the cause.

State, ex rel., v. Board.

STATE, *ex rel.* MILLISAPS *et al.*, v. BOARD OF EDUCATION
OF BLOUNT COUNTY.

(*Knoxville*. September Term, 1909.)

1. **MANDAMUS.** Discretion of boards will not be disturbed, except, when.

The courts will not, by *mandamus*, disturb the decisions and actions of boards and officers having discretionary powers, except where they act in an arbitrary and oppressive manner, or act beyond their jurisdiction, or where they refuse to assume a jurisdiction which the law devolves upon them.

Cases cited and approved: Turnpike Co. v. Marshall, 2 Bax., 104, 121, 123; Morley v. Power, 5 Lea, 691; Whitesides v. Stuart, 91 Tenn., 710; Williams v. Dental Examiners, 93 Tenn., 619; Insurance Co. v. Craig, 106 Tenn., 621, 639-643; State, ex rel., v. Taylor, 119 Tenn., 229.

2. **SAME.** Same. Case in judgment where action of board will not be disturbed by *mandamus*.

Where a county board of education, under a statute (Acts 1907, ch. 236, sec. 10, subd. 4) making it the board's duty to locate schools where deemed most convenient, locates a school at a certain place for the purpose of consolidating two of the schools, and ultimately three, into one, it acts within its discretion, which is beyond the control of the courts, and its decision and action will not be disturbed by *mandamus*.

State, ex rel., v. Board.

FROM BLOUNT.

Appeal from the Circuit Court of Blount County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court. GEORGE L. BURKE, Judge.

HARRISON & STICKLEY, for relators.

GAMBLE & CRAWFORD, for defendants.

PER CURIAM.

A petition was filed in the circuit court of Blount county against the defendant to compel it to locate a schoolhouse in a particular part of the Seventeenth civil district of the county. The relief asked was refused by the circuit court, and on appeal to the court of civil appeals this judgment was affirmed.

We think both courts decided correctly. The defendant board acted under chapter 236, p. 845, of the Acts of 1907. That act provides, among other things, that it shall be the duty of the county board of education "to locate schools where deemed most convenient, having due regard for lessening the number in order to improve the efficiency of the county system of education." Section 10, subd. 4. The county board located the school at a different place for the purpose of consoli-

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dating two of the schools, and ultimately three, into one. This was a matter within its discretion. The court cannot control such discretion by *mandamus* proceedings. *Insurance Co. v. Craig*, 106 Tenn., 621, 639-643, 62 S. W., 155; *Whitesides v. Stuart*, 91 Tenn., 710, 20 S. W., 245; *White's Creek Turnpike Co. v. John W. Marshall*, 2 Baxt., 104, 121, 123; *Morley v. Power*, 5 Lea, 691.

We know of no exception to the rule that the court will not, by *mandamus*, disturb the decisions and actions of the boards and officers having discretionary powers, except where they act in an arbitrary and oppressive manner (*Williams v. Dental Examiners*, 93 Tenn., 619, 27 S. W., 1019), or act beyond their jurisdiction (*Insurance Co. v. Craig*, *supra*), or where they refuse to assume a jurisdiction which the law devolves upon them (*State, ex rel., v. Taylor*, 119 Tenn., 229, 104 S. W., 242).

Affirm the judgment.

Wagner v. Bank.

T. H. WAGNER, Trustee, etc., v. CITIZENS' BANK & TRUST
COMPANY.¹

(*Knoxville*. September Term, 1909.)

1. BANKRUPTCY. Act does not enlarge the doctrine of set-off.

The bankruptcy act (Acts of Congress, July 1, 1898, ch. 541, sec. 68a, 30 Stat., 565), providing that "In cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid," does not enlarge the doctrine of set-off, or enable a party to have a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. (*Post*, p. 173.)

Acts of Congress cited and construed: Act July 1, 1898, ch. 541, sec. 68a, 30 Stat., 565.

Cases cited and approved: *Sawyer v. Hoag*, 17 Wall., 610; *Bank v. Massey*, 192 U. S., 138.

2. BANKS AND BANKING. Relation between bank and its depositor is that of debtor and creditor.

The general rule is that the relation between a bank and its depositor is that of debtor and creditor, and the bank is the debtor of the depositor. (*Post*, p. 174.)

Case cited and approved: *Harris v. Bank*, 110 Tenn., 249.

3. SAME. Same. Bank holds lien on general deposits to secure depositor's debt.

A bank holds a lien on general deposits to secure the repayment of the depositor's indebtedness, which lien may be enforced by applying the debtor's deposits to the debts as they mature. (*Post*, p. 174.)

¹ As to bank's right to apply deposit by fiduciary or representative on his debt to itself, see note to *Boyle v. Northwestern Nat. Bank* (Wis.), 1 L. R. A. (N. S.), 1110.

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4. **SAME.** Bank has no lien on special deposits to secure depositor's debt, when.

A bank has no lien on special deposits, or on moneys deposited for a specific purpose, as for collateral security, or for the payment of a particular debt. (*Post*, p. 174.)

5. **SAME.** Same. Trust deposit cannot be applied to trustee's individual debt.

Where a bank deals with a depositor as trustee, and recognizes funds standing in his name as trust funds, knowing them to be such, it cannot appropriate the same to the payment of the trustee's individual indebtedness to the bank, as there is no right of set-off against a trust deposit, nor any lien for the trustee's personal debts. (*Post*, pp. 174-183.)

Cases cited and approved: *State v. Bank*, 128 Iowa, 597; *Bank v. McCabe*, 135 Mich., 479; *In re Davis* (D. C.), 119 Fed., 950; *Wilson v. Dawson*, 52 Ind., 515; *Lynam v. Bank*, 98 Me., 448.

Cases cited and distinguished: *Bank v. Massey*, 192 U. S., 138; *Lowell v. Trust Co.*, 158 Fed., 781; *Clark v. Bank*, 160 Mass., 26.

6. **SAME.** Same. Same. Case in judgment.

Where, pursuant to an agreement between an insolvent business corporation and its creditors, funds of the corporation were deposited in a bank, which was a creditor, for *pro rata* distribution among all the creditors, and where the bank, through its president, consented thereto, and the funds were not to be checked out without the counter signature of the representative of the committee of the creditors, the funds were trust funds for a specific purpose, with the consent of the bank, and it had no right of set-off in said fund against the bankrupt corporation's indebtedness to it.

7. **BANKRUPTCY.** Trustee may recover funds deposited for all creditors as against bank's claim of set-off, when.

A trustee in bankruptcy may recover funds deposited in bank by the bankrupt for the benefit of all the creditors, pursuant to an agreement between the creditors, including the bank, even as against the claim of the bank for a set-off against the bankrupt.

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.
T. M. McCONNELL, Chancellor.

WHITE & MARTIN and BURKETT, MILLER & MOORE,
for complainant.

PRITCHARD & SIZER, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

Complainant, as trustee in bankruptcy of the Wilcox Furniture Company, a bankrupt corporation, filed the present bill to recover the sum of \$6,110.98 alleged to be due the bankrupt. The bill alleges that at the date of the adjudication of bankruptcy against said Wilcox Furniture Company, and also at the date of the appointment of the complainant as trustee in bankruptcy of said company, there was on deposit in the custody of the Citizens' Bank & Trust Company a fund, amounting to \$6,110.98, belonging to said Wilcox Furniture Company, and which fund was a part of its assets. It is alleged that said fund was impressed with the character of a trust fund, and was accumulated under cir-

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cumstances which fixed upon defendant Bank & Trust Company the character of trustee in relation to said fund. It is alleged in the bill that said money was accumulated as the result of an agreement among the creditors of the said bankrupt, including defendant bank, to the effect that the assets of the bankrupt should be collected, and the proceeds deposited in the defendant bank, and distributed *pro rata* among all the creditors. It is alleged that at the meeting of the creditors the defendant Citizens' Bank & Trust Company was represented by its president, G. N. Henson, and he concurred in the course then adopted, and agreed to act with the local creditors in pursuing whatever plan might be devised, and to share with them *pro rata* in the division of the proceeds which might be realized from the sale of the assets of the said Wilcox Furniture Company. It is then alleged that, after the appointment of a temporary receiver in the bankruptcy case, the defendant "set up a claim to said trust fund then on deposit in the bank, and claimed the right to set off, as against said fund, a large amount of indebtedness owing to it from the Wilcox Furniture Company."

It is then claimed that, under the facts set forth in the bill, the defendant is "estopped from appropriating said funds to its own use, to the exclusion of other creditors, or from setting up any adverse claim to the said fund, or from withholding the same from your complainant."

The defendant bank, in its answer, admitted that on

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the date of the adjudication in bankruptcy there was a balance of \$6,110.98 due from it to the bankrupt on deposit in its bank; but it averred that the bankrupt was indebted to the defendant by notes in an amount exceeding said balance, and that said credit balance in favor of the bankrupt was applied *pro tanto* to the payment of said notes. The bank denied that it held any trust fund belonging to the Wilcox Furniture Company at the time of its adjudication in bankruptcy, or that it was a trustee of said bankrupt with relation to any fund. It admitted that it had refused to pay said credit balance to complainant, and denied the allegations of the bill asserting a right in complainant to recover the same.

Proof was taken, and on the hearing the chancellor decreed that the deposit account in the defendant bank was impressed with the character of a trust fund for the benefit of all the creditors of the Wilcox Furniture Company, and that defendant bank was estopped from appropriating the same to its own use, to the exclusion of the other creditors. He accordingly pronounced a decree in favor of the complainant and against the defendant bank for the sum of \$5,810.98, but declined to allow any interest on the recovery, and adjudged the cost against the complainant.

The defendant bank appealed, and has assigned the following errors:

(1) That the bank is clearly entitled to the right of set-off claimed in its answer; and

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(2) That the trustee in bankruptcy has no right to enforce the alleged trust in behalf of the creditors, even if one existed.

The material facts necessary to be noticed are that in the spring of 1907 the Wilcox Furniture Company was indebted to various creditors in the sum of about \$40,000, and had also become delinquent in the payment of its current bills. The resident creditors, after securing inventories and examining into the condition of the company, extended to it further time on its past-due indebtedness, receiving from it notes therefor, and during the summer of 1907 the company succeeded in paying to each of the Chattanooga creditors about 25 per cent. of their respective claims. In the fall of 1907, on account of the financial panic that was then prevailing, the furniture company became still further embarrassed, and about October 1st the local creditors of the concern had another meeting in the city of Chattanooga, and, after conferring with the officers of the company, determined, with their consent, to convert the assets of the furniture company into cash, which should be deposited in the defendant bank, and only so much thereof used as might be necessary to defray current expenses and satisfy the claims of persistent creditors, and the surplus, after the accumulation of sufficient funds, should be divided pro rata among all the creditors, both local and foreign. A committee of three was appointed to represent the interests of all the creditors, and especially to see that the policy adopted by the

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meeting should be faithfully executed. It was also determined at the said meeting that the committee so selected should appoint a competent bookkeeper, by and with the consent of the Wilcox Furniture Company, who should be placed in the office of that company to represent the interests of the creditors, but who at the same time should be on the pay roll of the furniture company. It should be stated that the defendant bank, as a creditor of the furniture company, was represented at said meeting by its president. At a subsequent meeting a rule was adopted, with the consent of the defendant bank, whereby all the checks drawn by the president of the Wilcox Furniture Company against its bank deposit should be countersigned by the representative of the creditors' committee, and without such signature should not be honored by the bank.

The clear weight of the proof is that Mr. G. N. Henson, president of the Citizens' Bank & Trust Company, attended a number of meetings held by the creditors of the Wilcox Furniture Company and definitely agreed to the policy adopted by the committee of husbanding the resources of the furniture company, which should be deposited in the defendant bank, and after a sufficient accumulation the fund should be divided *pro rata* among all the creditors of the furniture company. We cannot, of course, undertake to detail the testimony establishing this proposition, and can only state our conclusion as to the weight of the testimony from an examination of the record. We think it undeniable on

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this record that the Wilcox Furniture Company was insolvent, at least from the date of the appointment of J. L. Morrison as the representative of the committee, and that this fact was known to the bank. The fact is the Wilcox Furniture Company was unable to meet its obligations as they matured in the usual course of business during the spring, summer, and fall of 1907. The proof shows that J. L. Morrison, the representative of the creditors' committee, prepared weekly financial reports of the condition of the furniture company, which he submitted to the creditors' committee. These reports commenced November 21, 1907, and continued down to the close of the week ending January 4, 1908. Mr. Morrison testifies that he kept Mr. Henson advised daily as to the condition of its affairs, and that Mr. Henson approved of the policy of the committee. The trustee in bankruptcy testified that claims amounting to \$33,718.90 had been proven against the bankrupt mercantile corporation. He further testified that all the assets of the furniture company had been disposed of, and the entire amount that came into his hands was \$9,941.02. It appears that the furniture company was indebted to the defendant bank, when the bankruptcy proceedings were commenced, in the sum of \$7,363, and that after the present suit was commenced the defendant bank applied the sum of \$6,110.98, standing to the credit of the furniture company on the books of the bank at the close of banking hours on January 17, 1908, to the indebtedness of the Wilcox Furniture

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Company, leaving the sum of \$1,252.50 as the balance due the bank, which it filed as a claim against the bankrupt. It appears that on January 7, 1908, the cash balance standing to the credit of the Wilcox Furniture Company in the Citizens' Bank & Trust Company was only \$217.17. It appears that the receipts from the total sales of the business conducted in the usual manner were not more than sufficient to defray the current expenses. The creditors of the company were becoming impatient, and some were threatening litigation. In this crisis the creditors' committee determined to throw the stock of goods on the market and dispose of them at auction sale. This mode of converting the stock of the company into cash was approved by the creditors, including the defendant bank. Accordingly auction sales were commenced on January 8th, and were continued from day to day until January 11th, when certain nonresident creditors of the Wilcox Furniture Company filed a petition of involuntary bankruptcy against it. At this date there was on deposit in the defendant bank the sum of \$4,761.25, which had been accumulated as the result of the first three days of the auction sale. Application was made to the trustee in bankruptcy to allow the sales to continue, and under an arrangement with the trustee the sales were continued for two or three days after the petition in bankruptcy was filed. The sum of \$2,301.72 was realized from the auction sales after the petition in bankruptcy was filed. We find from the proof that the fund which

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the bank is now seeking to set off against the indebtedness due it from the furniture company was accumulated as the result of the auction sales, and that it was understood by the defendant bank that this fund was being deposited with it as a special fund for *pro rata* distribution among all the creditors of the Wilcox Furniture Company.

The defendant bank bases its right to a set-off on section 68a of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat., 565 [U. S. Comp. St. 1901, p. 3450]), as follows:

“In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.”

In the case of *New York, etc., Bank v. Massey*, 192 U. S., 138, 24 Sup. Ct., 199, 48 L. Ed., 380, the supreme court of the United States, in dealing with the clause just mentioned, says:

“Section 68a of the bankruptcy act of 1898 is almost a literal reproduction of section 20 of the act of 1867.”

In *Sawyer v. Hoag*, 17 Wall., 610, 21 L. Ed., 731, in construing section 20 of the act of 1867 (Act March 2, 1867, 14 Stat., 526, c. 176), the court said as follows:

“This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.”

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The general rule is that the relation of the bank to the depositor is that of debtor and creditor, and the bank is the debtor of the depositor. *Harris v. Bank*, 110 Tenn., 249, 75 S. W., 1053.

"The bank holds a lien on the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting the two off against each other." 3 Am. and Eng. Ency. of Law (2d Ed.), p. 835.

It is also stated:

"The right of the bank to apply deposits to the extinguishment of the depositor's indebtedness as it matures grows out of the doctrine that relationship between the bank and the depositor is that of debtor and creditor." 3 Am. and Eng. Ency. of Law (2d Ed.), p. 835.

But it is well settled that a bank does not have "a lien upon special deposits or monies deposited for a specific purpose, as for collateral security or for the payment of a particular debt." 3 Am. and Eng. Ency. of Law (2d Ed.), p. 837, and cases cited.

Again it is said:

"The proposition that there is no right of set-off against a trust deposit, nor any lien for the trustee's personal debts, is axiomatic." 3 Am. and Eng. Ency. of Law (2d Ed.), p. 837, and cases cited.

In *State v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W., 159, it is said:

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"Where a bank, which was a creditor of an insolvent estate, received a deposit of funds from the receiver, it could not apply such funds on its claims, nor plead such claims as an offset against the deposit."

In *State Bank v. McCabe*, 135 Mich., 479, 98 N. W., 20, it is said:

"Where the bank deals with a depositor as trustee, and recognizes funds standing in his name as trust funds, knowing them to be such, it cannot appropriate them to the payment of the trustee's individual indebtedness to the bank."

This question arose in *Re Davis* (D. C.), 119 Fed., 950, wherein an insolvent partnership sold its stock of goods, and, by its direction, the purchaser deposited its price in the bank, taking a receipt therefor, showing that the money was to be prorated among the several creditors of the firm as their interests might appear. Subsequently, on petition of creditors, the partnership was adjudicated an involuntary bankrupt. After said adjudication, the bank undertook to apply the money so deposited on certain notes of the firm held by it and another creditor, without the consent of the depositor or the bankrupt, and to refuse the demands of the trustee therefor. Held, that the bank held the deposit in a fiduciary capacity as a trust fund, which precluded it from asserting an adverse claim thereto after the bankruptcy as against the trustee.

Among other things, the court said:

"Upon the merits of the controversy, would the bank

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be in position to successfully contest the right of the trustee to the money? Its ability to do so would depend upon its right to apply the fund to its own use. While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose, as, for example, to be paid to creditors, as was the case here."

In *Wilson v. Dawson*, 52 Ind., 515, it was said:

"It is a general rule that funds deposited in bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor."

In *Lynam v. National Bank*, 98 Me., 448, 57 Atl., 799, it appeared that:

"In June, 1902, the Standard Granite Company sent to each of its creditors, including the Belfast National Bank, a circular letter stating that it was unable to meet its obligations. A few days later in the same month it called a meeting of its creditors, at which meeting the Belfast National Bank was represented by one of its directors. At this meeting a committee of three creditors was appointed, with instructions to secure, if possible, the discharge of certain attachments which had been placed upon the property of the granite company. On September 4th following, the directors

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of the granite company passed a resolution, admitting the inability of the company to pay its debts, and its willingness to be adjudged a bankrupt on that ground. On the day following the granite company sent to the Belfast National Bank a deposit of \$800. At that time the granite company had a balance of \$1.04 standing to its credit on the books of the Belfast National Bank. The intention of the Standard Granite Company in making this deposit of \$800 was that it should be held by the bank until a trustee in bankruptcy for the granite company should be appointed; but no notice of such intention was given to the bank, and the deposit was credited to the account of the granite company and added to the balance of \$1.04 then standing on the books of the company.

“At the time this deposit was made the granite company was indebted to the bank to the amount of several thousand dollars. On the day following the making of this deposit of \$800, a petition in bankruptcy was filed against the granite company, and it was duly adjudged a bankrupt, and one Lynam was appointed and qualified as its trustee in bankruptcy. Said trustee made a demand on the bank for the \$800, which demand was refused; the bank claiming that it would offset the deposit on the past-due notes of the granite company.

“For some time past, all the efforts of the granite company . . . and that of its creditors had been to obtain a distribution of its assets equitably, and to that end the first attempt was to discharge the attach-

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ments. Honest dealing on the part of the granite company, which is to be presumed, required that all of its assets should be husbanded for the benefit of all of its creditors. Pending the effort to obtain an assignment or adjudication of bankruptcy, it had \$800 in money, which it intended to retain, and ought to retain, as part of its general assets. As some time would elapse before it could be thus administered, it was deposited in the bank, really for safe-keeping. All these facts were well known to the bank when it received the deposit. It knew it was not intended as a payment, and did not treat it as such. The bank could not fail to understand that it was intended that this money should be added to the other assets for the general benefit as it equitably ought to be. It certainly understood that the granite company, under the then existing circumstances, would not voluntarily subject this portion of its assets to a set-off by the bank, to the injury of other creditors.

“Upon consideration of all the circumstances, and the situation of the parties, we think it a fair inference that the bank understood that the deposit was intended only for safe-keeping, to be ultimately appropriated for the benefit of all the creditors of the granite company, and that in fact it was a deposit in trust for that purpose. And it being charged with such trust, the plaintiff, as trustee in bankruptcy, is entitled to recover.”

We are of opinion that these authorities are applicable in the present instance. It distinctly appears

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on this record that the funds accumulated in the defendant bank were deposited for a special purpose, with the knowledge and consent of the president of the bank; that the funds could not be checked out by the president of the furniture company without the signature of J. L. Morrison, representative of the creditors' committee. The fund thereby became a trust deposit for specific purposes, with the knowledge and consent of the bank, and the latter had no right of set-off in said fund against the bankrupt's indebtedness to the bank.

Counsel for the bank relies on several cases as announcing a contrary doctrine, namely, *New York County Bank v. Massey*, 192 U. S., 138, 24 Sup. Ct., 199, 48 L. Ed., 380; *Clark v. Northampton Nat. Bank*, 160 Mass., 26, 35 N. E., 108; *Lowell v. International Trust Co.*, 158 Fed., 781, 86 C. C. A., 137.

In *Bank v. Massey*, *supra*, the court said:

"It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes part of the general funds of the bank, to be dealt with by it as other moneys, to be loaned to customers and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character."

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But in that case the facts did not show a deposit for a special purpose, with the knowledge and consent of the bank, but only a deposit in the ordinary course of business. In such a case the authorities are uniform that the bank has the right to set off its notes against the deposits.

In *Clark v. Northampton National Bank*, supra, the case seems to have turned on a finding of fact by the lower court. The court said as follows:

“The amount of the notes is to be set off against the balance due on account of the deposits at the time of the commencement of the proceedings in bankruptcy, unless the deposits made after March 8, 1892, are to be construed as made with a view to give a preference or to effect a fraudulent transfer of property, contrary to the statute relating to insolvency, or as made upon a trust for the creditors. Whether these deposits were made in violation of either section 96 or section 98 of chapter 157 of the Public Statutes was a question of fact, and the court, trying the case without a jury, has found that they were not so made. On the facts found by the court, the rulings on this part of the case were right.

“We are not certain that the exceptions set out all the evidence. Enough, however, is recited to show that the plaintiff had some ground to contend that after March 8th the bank knew that the business of the Florence Tack Company was being carried on with a view of converting its assets into cash for the benefit of

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its creditors, and that the company must either effect a compromise with its creditors or go into insolvency. The money received after March 8th ought perhaps to have been specially deposited; but this was not done, and the account of the tack company with the bank continued unchanged in form. There is evidence that the defendant's cashier understood that, after March 8th, checks were to be drawn only to 'pay the help' of the company; but there is also evidence that checks were in fact drawn for other purposes and were paid. There appears to be no doubt that the officers of the bank knew of the insolvency of the company on March 8th. Still it is a question of fact whether the transactions between the company and the bank after March 8th were had under an implied contract or understanding on the part of both parties different from that which existed before. The [lower] court has in effect found that after March 8th the money continued to be deposited and the checks to be drawn on the same understanding as that which existed before that time; that is, upon the understanding that the relation of the parties continued to be the ordinary one of a depositor with a bank of discount and deposit. We cannot say, as a matter of law, that this finding was wrong. It was for the court below to draw the proper inferences of fact, and the exceptions disclose no errors of law."

In *Lowell v. International Trust Co.*, *supra*, it was said:

"Portions of the propositions submitted to us by the

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trustee allege that the bankrupt had been insolvent for a considerable time, and that during that period it had been struggling along with its business, with some support from its creditors, and with an understanding between the International Trust Company and some other creditors, by virtue of which all of them, including the International Trust Company, should receive certain *pro rata* benefits out of whatever funds might come from the Thomas & Pike Coal Company. Therefore it is claimed that the funds now sued for are held by the International Trust Company in a *quasi* trust, enforceable by the trustee."

The court held: "A trustee in bankruptcy has no interest, which he can enforce for the benefit of the general creditors, in an arrangement between the bankrupt and certain creditors, by which money deposited with one, which was a bank, was to be held in trust and distributed *pro rata* between them, and which was not prohibited by the bankruptcy statute."

The facts appearing in *Lowell v. International Trust Co.* are very different from the facts presented on the present record. There the trustee was seeking to enforce a contract between the bankrupt and certain creditors. In the present instance the fund was accumulated in defendant bank for the benefit of all the creditors, and the bank had become a party to the arrangement. In the present case the trustee clearly has a right to recover a fund which had been deposited by the bankrupt for the benefit of all the creditors.

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We are therefore of opinion that the bank is estopped, by its conduct and by its agreement with the other creditors, from asserting any right to a set-off against the funds derived from the sales of the stock of the furniture company, and that the decree of the chancellor so holding was correct; and the same is affirmed.

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STATE, *ex rel.* JOHN P. DAVIS, *v.* FRANK EVANS.

(*Knoxville.* September Term, 1909.)

1. COUNTY SUPERINTENDENT OF SCHOOLS. Elected without certificate of qualification cannot, in a quo warranto proceeding, show his eligibility by allegation of improper question asked on examination, when.

In a proceeding in the nature of a *quo warranto* to test the right of the defendant to hold over the office of county superintendent of public schools, after the expiration of his regular term, in which the relator claimed that he was duly and regularly elected to the office, and that he qualified by giving bond and taking the oath of office required by law, but that defendant refused to turn over to him the books and papers appertaining thereto, on the alleged ground that the relator was ineligible, because he was not in possession of the certificate of qualification from the State board of education as required by statute (Acts 1895, ch. 54), the court cannot consider the relator's contention that his failure to receive the certificate arose out of a mistake in an examination question asked him, and that if the question had been properly stated, he could and would have answered it correctly, and would have then received the certificate. (*Post*; pp. 187, 188.)

Acts cited and construed: Acts 1895, ch. 54.

2. CONSTITUTIONAL LAW. Statute requiring county superintendents of public schools to possess literary and scientific qualifications to be evidenced by certificate of State board of education is not unconstitutional as delegating legislative power.

The general school law (Acts 1873, ch. 25), by section 8 thereof, created the office of county superintendent of public schools, and provided that he should be a person of literary and scien-

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tific attainments, and, by section 31 thereof, prescribed the subjects to be taught in the public schools; and said section 8 was amended by a subsequent statute (Acts 1895, ch. 54) prescribing the same qualifications, and also requiring candidates for the office, previous to the election, to file certificates of qualification given by the State board of education, after undergoing a public examination, as a prerequisite to eligibility. Held, that said section 8, as originally enacted and as amended, necessarily referred to said section 31 prescribing the subjects to be taught; and the proficiency required in literature and science is in respect to those subjects, and the said amendatory statute (Acts 1895, ch. 54) is not unconstitutional, as delegating legislative power to the board, because the board is only made a legislative agency for executing the purpose of the legislature. (*Post*, pp. 188-193.)

Acts cited and construed: Acts 1873, ch. 25, secs. 8 and 31; Acts 1895, ch. 54.

Cases cited and approved: *Leeper v. State*, 103 Tenn., 500, 523, 526; *People, ex rel., v. Kipley*, 171 Ill., 44; *Ex parte Bassitt*, 90 Va., 679; *People v. Dunn*, 80 Cal., 211; *Commissioners v. Smith*, 22 Colo., 534; *Blue v. Beach*, 155 Ind., 121; *Scholle v. State*, 90 Md., 729; *State v. Thompson*, 160 Mo., 333; *Hurst v. Warner*, 102 Mich., 238; *State, ex rel., v. Stewart*, 74 Wis., 620; *Commissioners v. Sisson*, 189 Mass., 247; *Saratoga Springs v. Gas Co.*, 191 N. Y., 123.

Case cited and distinguished: *Wright v. Cunningham*, 115 Tenn., 445.

3. **COUNTY SUPERINTENDENT OF SCHOOLS.** Statute requiring qualification by certificate is mandatory, and not merely directory.

The mandatory statute (Acts 1895, ch. 54) prescribing the qualifications of county superintendents of public schools, and requiring them to possess a certificate of qualification given by the State board of education, is mandatory, and not merely directory, as shown by the clear intention of the legislature to

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make eligible for election only such persons as could comply with the conditions indicated, which intention is emphasized by the provision giving the county court power to remove the superintendent for inefficiency. (*Post*, p. 193.)

Acts cited and construed: Acts 1895, ch. 54.

4. **SAME.** Relator submitting question of his eligibility cannot require it to be tested by independent proceeding by defendant. Where, in a proceeding in the nature of a *quo warranto* to test the right of the defendant to hold over the office of county superintendent of public schools, after the expiration of his term, the relator submits in his bill, to the determination of the court, the question of his eligibility to the office to which he had been elected, he cannot then successfully contend that, because he had been elected and had qualified by giving bond and taking the required oath, defendant should test relator's eligibility and right to office by some independent proceeding. (*Post*, pp. 193, 194.)

5. **QUO WARRANTO.** Incumbent holding over is not a usurper for failing to take the required oath, when.

In a proceeding in the nature of *quo warranto* to test the right of the defendant to hold over the office of county superintendent of public schools, after the expiration of his term, the relator, newly elected to the office, cannot successfully contend that the defendant was a usurper, because he only took the oath of office, and did not take the oath to support the constitution of the United States and that of Tennessee, especially where it does not affirmatively appear that such oath was not taken. (*Post*, p. 194.)

Cases cited and approved: *Staggs v. State*, 3 Hum., 372; *State v. Allen* (Tenn. Chy. App.), 57 S. W., 189.

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FROM CLAIBORNE.

Appeal from the Chancery Court of Claiborne County. T. A. R. NELSON, Chancellor.

JOUBOLMON, WELCKER & SMITH, for relator Davis.

CARR & JONES, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

This is a proceeding, in the nature of a *quo warranto*, to test the right of the defendant to hold the office of county superintendent of public schools for Claiborne county, holding over at the expiration of his regular term, which ended on the first Monday in January, 1909. The relator charges that on the day last mentioned he was regularly elected by the county court, the constituent body, to the office, by a vote of 12 in his favor to 7 in favor of the defendant, only nineteen justices being present and voting. He alleges that he was declared duly elected; that he gave the bond required by law, and took the oath of office, but the defendant refused to turn over to him the books and papers appertaining thereto, alleging, as ground for such action on his part, that the relator was not eligible

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to the office, and therefore that his election was void. The point of ineligibility in controversy, as appears from the bill, is that the relator was not in possession of the certificate from the State board of education, required by chapter 54, p. 70, Acts 1895. It is alleged that the relator really possessed the qualifications required by the act, and that he was entitled to the certificate which it is the business of the board to issue, and that his failure to receive it arose out of a mistake on the part of the board in stating one of the questions submitted for his examination. It is alleged that the question—one in mathematics—was improperly stated by the board, and if properly stated he could, and would, have given a correct answer, and would then have received the certificate. These are matters, of course, with which we can have no concern in the present proceeding. Aside from all this, however, it is insisted that the act in question is unconstitutional, and for that reason, if for no other, the relator was duly elected, and was entitled to the office. The purpose of the bill is to question the right of the defendant to hold over, the charge being that he is a usurper of the office in his attempt to hold over, and, incidentally thereto, it is alleged that the relator is the person entitled to administer the duties of the office, because of his said election.

There is no controversy in the record that the relator was elected in the manner above stated, and that,

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if he was eligible to the office, the defendant is a usurper, and should be restrained from further interference.

The case turns upon the constitutionality of the act above referred to. This act purports to amend section 8 of the general school law, which is chapter 25, p. 41, of the Acts of 1873.

Section 8, as it appears in the original act, reads as follows:

"Sec. 8. Be it further enacted, there shall be a county superintendent for each county, who shall be elected by the county court at its April or July term, 1873, and after 1874 he shall be elected biennially in January, and no member of the county court shall be eligible to said office. *He shall be a person of literary and scientific attainments, and, when practicable, of skill and experience in the art of teaching,* shall hold his office for two years, and shall receive such pay for his services as may be allowed him by the county court, to be paid upon the order of the chairman or judge of the county court by the county trustee. He shall be subject to removal from office for misbehavior or inefficiency at any time, by the county court: Provided, that the causes for such removal shall be communicated to him in writing."

We have written in italics the part of this section which was amended by chapter 54 of the Acts of 1895. In this act the language above italicized is stricken out and the following substituted:

"Said county superintendent shall be a person of lit-

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erary and scientific attainments, and of skill in the theory and practice of teaching: Provided, that preceding each biennial election, or any election to fill a vacancy for county superintendent of schools, each applicant shall file with the chairman of the county court a certificate of qualification given by the State board of education: Provided, that on the first Monday in October preceding each biennial election for county superintendent of schools, each applicant for said office shall undergo a public examination at the county seat of the county in which he or she is an applicant, by and before a commission of three residents of the county, said commission to be previously appointed by the chairman of the county court, and to be citizens who, by education and experience, are most eminently qualified to hold said examination, the same to be held under such rules and regulations as may be prescribed by the State board of education: Provided, that if qualified as attested by said examination, said applicant shall receive a certificate of qualification by the State board of education."

It is insisted in behalf of relator that this amendment devolves legislative power upon the State board of education, because it is a legislative function to prescribe the qualifications of public officers. It is argued that the language of the legislature in stating the qualifications required, that he "shall be a person of literary and scientific attainments, and of skill in the theory and practice of teaching," is so general as to leave it practically

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within the power of the State board to declare the qualifications necessary for the office, since they can exact a very high grade of attainments, or may be content with a very low grade, and they may indicate the different subjects upon which proficiency may be required within the wide range covered by the words "literary and scientific attainments."

There is plausibility in the objection, but no real force. The act of 1873, which is amended, laid down, in section 31, the subjects to be taught in the public schools. It was with reference to these, of course, that the provisions of section 8 were enacted. It is noted that section 8, as originally written, prescribed, in substance, the same general qualifications. They meant, of course, a reasonable degree of attainment in literature and science, in respect of the subjects that were to be taught, to the end that the county superintendents might be able to exercise proper judgment in the selection of teachers and in the oversight of their work. Before section 8 was amended, the duty was devolved upon the county court of judging the qualifications of the county superintendent to be elected. Under the amendment means were provided, through boards composed of skilled persons, of ascertaining whether a candidate could come within the description, or list of qualifications, indicated by the act. There was in this no delegation of legislative power, but simply the provision of administrative agencies for the purpose of aiding in the execution of the purpose of the legisla-

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ture. The legislature itself prescribed the necessary qualifications, and the boards created and referred to simply determined whether given persons came within those requirements, or were possessed of those qualifications. It was impracticable for the legislature itself to lay down, with precision, the degree of efficiency in literature and science that the county superintendents should possess. In the nature of things, this must be left somewhat indeterminate, and it was highly proper that the ascertainment of the exact degree of learning necessary to carry out the purpose of the act should be left for the action of competent boards. See, on the general principle, the following authorities: *Leeper v. State*, 103 Tenn., 500, 523, 526, 53 S. W., 962, 48 L. R. A., 167; *People, ex rel., v. Kipley*, 171 Ill., 44, 49 N. E., 229, 41 L. R. A., 775, 782, 783; *Ex parte Bassitt*, 90 Va., 679, 19 S. W., 453; *People v. Dunn*, 80 Cal., 211, 22 Pac., 140, 13 Am. St. Rep., 118; *Pueblo County Com'rs v. Smith*, 22 Colo., 534, 45 Pac., 357, 33 L. R. A., 465; *Blue v. Beach*, 155 Ind., 121, 56 N. E., 64, 50 L. R. A., 64, 69, 70, 80 Am. St. Rep., 195; *Scholle v. State*, 90 Md., 729, 46 Atl., 326, 50 L. R. A., 411, 414; *State v. Thompson*, 160 Mo., 333, 60 S. W., 1077, 54 L. R. A., 950, 952-953, 83 Am. St. Rep., 468; *Hurst v. Warner*, 102 Mich., 238, 26 L. R. A., 484, 491, 47 Am. St. Rep., 525; *State of Wisconsin, ex rel., v. Stewart*, 74 Wis., 620, 43 N. W., 947, 6 L. R. A., 394; *Comm. v. Sisson*, 189 Mass., 247, 75 N. E., 619, 1 L. R. A., (N.

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S.), 752-755, 109 Am. St. Rep., 630. And see the full discussion of the general subject by Cullen, C. J., in *Trustees of Saratoga Springs v. Saratoga, etc., Gas Co.*, 191 N. Y., 123, 83 N. E., 693, 18 L. R. A. (N. S.), 713, 718, et seq. The case of *Wright v. Cunningham*, 115 Tenn., 445, 91 S. W., 293, cited by complainant's counsel, is not at all in conflict with the principle we have invoked as the basis of the present decision.

We need not pursue the subject. We are of the opinion that the amendment is clearly constitutional.

It is insisted that the terms of the amendment are not mandatory, but only directory. We think this is a mistaken view. It was the clear purpose of the legislature to make eligible for election only such persons as could comply with the conditions indicated. This general purpose is emphasized by the provisions of the original section giving the county court power to remove the county superintendent for inefficiency.

There are some points of alleged unconstitutionality insisted upon other than the one above referred to, but we do not think they deserve special consideration in this opinion. Suffice it to say that we have examined them, and find no merit in them.

It is insisted that since the relator was elected by the county court, and had executed bond, and had taken the oath, he should be permitted to take and administer the office, and the burden of establishing his ineligibility should be cast upon the defendant, and be presented by him in some independent litigation. Whatever force

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might be in this, as an original suggestion, it cannot be considered here, because the relator himself submitted in his bill, to the determination of the court, the question of eligibility.

It is insisted that, at all events, the defendant should be declared a usurper because, when he was inducted into office, in 1907, he did not take the oath to support the constitution of the United States, and of the State of Tennessee, but that he took only the oath of office. We do not think there is any sufficient allegation in the bill upon this subject (Gibson's Suits in Chancery, sec. 455), and, if there was, it does not affirmatively appear that he did not take the oath referred to, and for these reasons the point suggested is not well taken (*State v. Allen* [Tenn. Ch. App.], 57 S. W., 189; *Staggs v. State*, 3 Humph., 372). In saying this, we are not to be understood as holding that the inadvertent omission to take the oath referred to would result in a deprivation *ipso facto* of the defendant's official character.

On the grounds stated, we are of the opinion that the decree of the chancellor, in favor of the defendant, must be sustained.

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MRS. LYDIA B. LANDRETH v. F. POWELL *et al.*

(*Knoxville*. September Term, 1909.)

1. **ATTORNEYS' FEES.** No lien on land where suit for relief against option contract is abandoned, and land is conveyed according to contract.

Where the complainant, in a suit to cancel a contract giving defendant an option to purchase certain real estate, abandoned the right of action, and, upon agreement of the defendant to pay the contract price and the costs of the suit, conveyed the premises to defendant, the litigation was not compromised, but complainant abandoned the purpose of the suit without obtaining anything whatever by the litigation, and determined to perform the contract from which relief was sought; and, therefore, complainant's attorney did not acquire a lien on the real estate for his fee.

2. **SAME.** Same. Attorneys will be taxed with costs upon disallowance and dismissal of their petition to have lien declared for fees.

Where the solicitors of the complainant in a suit to be relieved from an option contract to convey certain land, upon complainant's abandonment of such suit, and conveyance of the land in accordance with the option contract, filed a petition to have a lien declared on the land for their fees which petition was disallowed and dismissed for the reasons stated in the foregoing headnote, the attorneys in whose names the petition was filed will be taxed with the costs of the petition and of the litigation arising therefrom.

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FROM WASHINGTON.

Appeal from the Chancery Court of Washington County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.
HAL H. HAYNES, Chancellor.

JOHNSON & MILLER and S. E. N. MOORE, for complainant.

J. B. Cox, for defendants.

PER CURIAM.

The controversy in this case arises over a petition filed by the attorneys of the complainant to have charged upon certain property of the defendant a fee of \$100, which the complainant promised them for the conduct of the present litigation. The chancellor granted the petition, and on appeal to the court of civil appeals that court affirmed the chancellor. Thereupon a writ of *certiorari* was sued out, and the case was brought to this court.

We think both of the courts referred to were in error.
The facts are these:

Mrs. Landreth filed her bill in the chancery court of Washington county, charging that the defendant

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Powell had, by taking advantage of her mental infirmity, arising from great age and illness at the time, procured from her an option upon a certain piece of real estate described, for the consideration of \$1 paid at the time, and a promise of \$1,549 in case the option should be finally consummated. She sought to have the option cancelled because it was procured in the manner just stated. She alleged in her bill that Powell had transferred the option to the Unaka Corporation, and that this latter was insisting upon carrying it out, and was demanding a conveyance of the property. Pending the proceeding, Mrs. Landreth concluded to abandon her right of action, and, upon agreement of the defendant to pay her \$1,549, the contract price, and the costs of the cause, she conveyed the property to the defendant corporation and quit the litigation.

It was the opinion of the chancellor, and of the court of civil appeals, that the foregoing amounted to a compromise of the litigation, and that the attorneys for Mrs. Landreth were entitled to a lien for the \$100, their fee, on the land conveyed. We think this was an erroneous view. Mrs. Landreth obtained nothing whatever by the litigation. She abandoned the purpose of the suit, and determined to perform the contract from which she had asked relief.

We are of the opinion that the decree of the court of civil appeals, and of the chancery court, should be reversed, and that the attorneys, in whose names the petition was filed, should be taxed with the costs of the petition and of the litigation arising therefrom.

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STATE v. R. W. WEAVER.¹

(Knoxville. September Term, 1909.)

1. **REGISTRATION LAWS.** Prescribe no qualification of voters, but are to determine who possess the voting qualifications. The registration laws, authorized by the constitution (art. 4, sec. 1), empowering the legislature to enact laws to secure the freedom of elections and the purity of the ballot box, prescribe no qualifications of electors, but regulate the exercise of the elective franchise, and prescribe a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter, and serve to identify those registered as qualified to vote. (*Post*, pp. 200-204.)

Acts cited and construed: Acts 1890 (ex. ses.), ch. 25; Acts 1891, ch. 224; Acts 1891 (ex. ses.), ch. 12.

Constitution cited and construed: Art. 4, sec. 1.

Cases cited and approved: *Moore v. Sharp*, 98 Tenn., 498; *Madison v. Wade*, 88 Ga., 699; *People v. Hoffman*, 116 Ill., 611; *State v. Butts*, 31 Kan., 550.

2. **SAME.** Apply to all elections and all voters in counties and districts falling within their provisions.

The registration laws apply to all elections in the counties and civil districts falling within their provisions, and to all voters, whether property holders or residents, voting in the elections, and hence apply to municipal elections in the town of Lonsdale in Knox county, because said county has a population of over 50,000, though the town charter (Acts 1907, ch. 305) merely defines the qualification of voters in the municipal elections, and does not provide for registration. (*Post*, pp. 204-206.)

Code cited and construed: Secs. 1189, 1198, 1199 (S.).

Acts cited and construed: Acts 1907, ch. 305.

¹ As to validity of registration laws, see note to *State, ex rel. Allison, v. Blake* (N. J.), 25 L. R. A., 480.

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3. **SAME.** Voter otherwise qualified to vote, but voting without registration, is guilty of a misdemeanor.

The registration laws make registration a prerequisite to voting in all elections held in counties and districts falling within their provisions, and prohibit voters from voting without the required lawful registration, and a landowner thus qualified to vote, but voting in a municipal election without such registration, is guilty of a misdemeanor. (*Post*, p. 206.)

Code cited and construed: Sec. 6437 (S.); sec. 5347 (M. & V.); sec. 4596 (T. & S. and 1858).

4. **SAME.** Voters must register in the civil district, ward, or precinct where they propose to vote.

The registration laws require voters to register in the civil district, ward, or voting precinct where he proposes or offers to vote, as a prerequisite to his right to vote therein. This clearly appears from a consideration of all the provisions of the statutes, and such has been their practical construction. (*Post*, pp. 206, 207.)

Code cited and construed: Sec. 1217 (S.).

Case cited and approved: *State v. Butts*, 31 Kan., 550.

FROM KNOX.

Appeal in error from the Criminal Court of Knox County. T. A. R. NELSON, Judge.

W. W. FAW, Assistant Attorney-General, for State.

R. A. BROWN, for defendant.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

The defendant was indicted in the criminal court of Knox county for knowingly voting, as the owner of real estate situated in the town of Lonsdale, Knox county, in a municipal election held in that town, without first having there registered twenty days or more before the election, as provided by chapter 25, p. 59, Acts Ex. Sess. 1890, chapter 224, p. 438, Acts 1891, and chapter 12, p. 30 Acts Ex. Sess. 1891.

A motion was made to quash the indictment, upon the grounds that it was not a misdemeanor to vote illegally in a municipal election, and that registration was not required of owners of real estate in Lonsdale in municipal elections there held. The trial judge overruled the first ground of the motion, and sustained the latter, and quashed the indictment. The State and the defendant both prosecuted appeals in the nature of writ of error, and have assigned the action of the trial judge adverse to them, respectively, as error.

We think the first ground of the motion was properly overruled, and the second erroneously sustained.

The contention of the defendant is predicated upon the provision of the charter of Lonsdale (chapter 305, p. 1048, Acts 1907) defining the qualifications of voters in elections to be held in the municipality for the election of municipal officers, which is in these words:

“The votes shall be by ballot, all persons owning real

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estate within said corporation, all persons living therein and who have been residents thereof for six months previous to said election and who are entitled to vote for members of the general assembly shall be entitled to vote in said election."

The qualification here prescribed applies to all voters, whether they be owners of real estate in the municipality or residents therein.

To be entitled to vote for members of the general assembly, under the constitution, the voter must be a male person who is twenty-one years old, a citizen of the United States, and a resident of the State for twelve months and of the county six months; and the only other qualification which can be prescribed is the payment of poll taxes and the production of satisfactory evidence of such payment for such preceding period as the legislature shall prescribe and at such time as may be prescribed by law. Const., art. 4, section 1.

These are all the qualifications required of those authorized to vote in elections held in the municipality.

The registration laws of the State do not prescribe qualifications of electors, but were enacted for the purpose of regulating the exercise of the elective franchise, and are authorized by the concluding clause of section 1, art. 4, of the constitution, ordaining that the general assembly shall have power to enact laws to secure the freedom of elections and the purity of the ballot box.

In *Madison v. Wade*, 88 Ga., 699, 16 S. E., 21, it is held that registration adds no qualification to voters,

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but merely serves to identify them as a person qualified to vote. In *People v. Hoffman*, 116 Ill., 611, 5 N. E., 596, 8 N. E., 788, 56 Am. Rep., 793, it is said that a registry law is merely a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter. In *State v. Butts*, 31 Kan., 550, 2 Pac., 618, 619, Judge Brewer, now Mr. Justice Brewer of the supreme court of the United States, speaking for the court, said:

"It is evident that a proper enforcement of this statute, in securing ten days before every election a full registry of all persons entitled to vote, furnishes a very efficient check against fraudulent voting. At any election in which much interest is felt, and where the opposing parties are supposed to be nearly equal in numbers, most careful scrutiny will be made of these registry lists, every voter's name and residence taken, and his right to vote verified by examination. The matter will not be left to the pressure and excitement of election day, but will all be ascertained and determined prior thereto. The value of such a registry for the preservation of the purity of the ballot box cannot be too highly estimated. . . . Obviously, what was contemplated was the ascertaining beforehand, by proper proof, of the persons who should on the day of election be entitled to vote; and any reasonable provision for making such ascertainment must be upheld. Requiring a party to be registered is not in any true sense imposing an additional qualification, any more

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than requiring a voter to go to a specific place for the purpose of voting, or requiring him to prove by his own oath or the oaths of other parties his right to vote when challenged, or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof, steps to be taken in order to ascertain who are and who are not entitled to vote."

Judge Cooley, in his work on Constitutional Limitations (page 601), said:

"In some of the States it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the names of every person entitled to vote. Under such a registration the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors, also, by means of this registry, are notified in advance of the persons claiming the right to vote, and are enabled to make the necessary examination to determine whether the claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the constitution has established no such rule, and is entirely silent on the subject, it has sometimes been claimed that the statute

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requiring voters to be registered before the day of election and excluding from the right all whose names do not appear upon the list was unconstitutional and void, as adding another test to the qualifications of electors which the constitution has prescribed, and as having the effect, where the electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law. This position, however, has not been accepted as sound by the courts. The provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. Such regulations must always have been within the power of the legislature unless forbidden."

This was quoted by this court with approval in the case of *Moore v. Sharp*, 98 Tenn., 498, 41 S. W., 587.

These registration laws apply to all elections, including those of municipalities, in the counties and civil districts falling within their provisions. We quote the sections evidencing this as codified in Shannon's edition of the Code, viz.:

"Sec. 1189. In all civil districts, wards, and voting precincts in counties which have a population of 50,000 or over that number, computed by the federal census of 1890, or which may hereafter have that number or over, computed by any subsequent federal census, and in all cities, towns, and civil districts, having a population of 2,500 inhabitants or over that number computed by the federal census of 1890, or may hereafter have that number or over, computed by any subsequent federal census,

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each and every voter, in addition to the other regulations required by law, shall be registered as a voter as hereinafter provided before he shall be allowed to exercise the elective franchise in any election held in any civil district, ward, or voting precinct in said counties having a population as herein provided: Provided, that the last published census shall control in every case. (Ex. Sess. 1890, c. 25, section 1; 1891, c. 224, section 1; Ex. Sess. 1891, c. 12.)”

“Sec. 1198. Registration, as provided for in section 1197, and the other provisions thereof, shall be a prerequisite to voting in all elections in such territory; and when such registration has been made under the provisions of this article, no other or further general registration for two and four years shall be made or required as a prerequisite to his voting, except in cases where the voter has changed his residence. (Id., section 3.)

“Sec. 1199. No voter shall be allowed to vote in any election wherein registration is required by law, unless he shall have first registered, under the provisions of this article, as much as twenty days before the election wherein he offers to vote is held. But registration of voters shall only be required every four years hereafter in the civil districts having less than five thousand population, according to last census, whenever said civil districts are in the counties not wholly subject by the present laws to registration. (Id., section 4.)”

They not only apply to all elections in the territory coming within the provisions of the statute, but to all

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voters, whether as property holders or residents, voting in the election. No exception of any kind is made. They make registration a prerequisite to voting in all elections and prohibit voters from voting without lawful registration. All who do so are guilty of a misdemeanor. Code 1858, section 4596. Knox county falls within the provisions of these laws, and they therefore apply to all elections and voters in the municipality of Lonsdale.

The voter must register in the civil district, ward, or voting precinct where he offers to vote. This clearly appears from a consideration of all the provisions of the statutes, and such has been their practical construction. Section 1217 requires the registrars of each district, or voting precinct, to appear at the place where the election is held with the books in which the voters are numbered, which are made evidence of registration, and occupy places inside the polling precincts, and check off or mark said voters as each voter therein registered shall vote. The voter's name cannot appear upon these books unless he has there registered. No other registration books are required or authorized to be present or used, and a registration in another precinct would not avail the voter anything. If the registration laws did not apply to the place of the residence of the non-resident voter, and the law was as insisted, he could not register anywhere, although he could not vote at the place where the laws do apply without registration. The registration must be in the district or ward where the vote is proposed to be cast.

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When considered from the viewpoint of the objects and purposes of the registration law, the reasons for requiring registration of nonresident real estate owners, and resident real estate owners who may not have lived in the town of Lonsdale for a sufficient length of time to otherwise qualify them to vote, are more weighty than in the case of voters who have lived there for a sufficient length of time to qualify them to vote without regard to the real estate qualifications; for, ordinarily, there is more likelihood that the voters of the latter class, and their qualifications, will be known to the judges of election, and the candidates and their friends, than those of the former class. As was well said by Mr. Justice Brewer, in *State v. Butts*, supra, viz.: "Obviously what was contemplated was the ascertaining beforehand, by proper proof, of the persons who should on the day of election be entitled to vote," so that "the matter will not be left to the pressure and excitement of election day, but will all be ascertained and determined prior thereto."

The motion to quash is overruled, and the case remanded for trial.

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MARY A. CAMPBELL *et al.* v. J. S. BARTLETT *et al.*

(*Knoxville*. September Term, 1909.)

1. **SPECIFIC PERFORMANCE.** Of title bond contract must be sued for with reasonable promptness.

A bill for specific performance of a contract of sale of land evidenced by a title bond must be brought with reasonable promptness, even where the writing does not in terms make time of the essence of the contract, especially where there has been a great increase in the value of the property, and the purchase price has not been paid. (*Post*, p. 214.)

Case cited and approved: *Smith v. Christmas*, 7 Yerg., 565.

2. **SAME.** Same. Coverture or infancy is no excuse for unreasonable delay to perform contract and sue for specific performance.

In a suit for the specific performance of a contract of the sale of land evidenced by a title bond, the rule, requiring the infant heirs of the deceased purchaser to perform their ancestor's contract by the payment of the purchase money, with reasonable promptness, to entitle them to relief, applies to a married woman as well as an infant, and her disability, like that of an infant, is not an excuse for unreasonable delay in making payment; and after a great lapse of time, and a large increase in the value of the property, a married woman, notwithstanding her disability, will not be awarded specific performance of a contract of the sale of land evidenced by a title bond in favor of her father, on which the purchase money was long past due when he died, especially where she seeks specific performance as to only an undivided one-eighth interest in the land as the share inherited by her, forty-two years after the death of her father and twenty-six years after the surrender of the title bond and the abandonment of the property by the other heirs.

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Cases cited and approved: *Smith v. Christmas*, 7 Yerg., 565; *Mann v. Dun*, 2 Ohio St., 187; *Brown v. Haines*, 12 Ohio, 1; *Henry v. Conn*, 12 Ohio, 193; *Scott v. Barber*, 14 Ohio, 547; *Benedict v. Lynch*, 1 Johns. Chy., 370.

Cases cited and distinguished: *Dodd v. Benthal*, 4 Helsk., 601; *Moore v. Walker*, 3 Lea, 656.

Numerous Tennessee cases upon the subject of estoppel of married women are cited in the opinion, on pages 213, 214.

FROM CAMPBELL.

Appeal from the Chancery Court of Campbell County.
HUGH G. KYLE, Chancellor.

JAMES M. HILL, JOHN P. ROGERS, and AGEE & PETERS,
for complainants.

W. A. OWENS and JOUROLMON, WELCKER & SMITH,
for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed to recover a one-eighth undivided interest in a tract of land described. This land was sold, or the greater part of it in 1853, to James S. Murray, complainant's father, by a title bond executed by one J. M. Cooper. In 1861, fifty acres additional were added, and

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the old title bond taken up and a new one executed, putting both tracts into one. In December, 1864, Murray died, without having paid the purchase money for either tract. His children all married and moved away, except F. M. Murray. He remained upon the land with his mother until about the year 1871, when, becoming convinced that they could never pay the balance of purchase money due, which, with interest, was then more than the original sum, they surrendered the bond, and the possession of the land, to the vendor, Cooper. He placed a tenant in possession, one Reuben Marlow, who remained until about 1880. P. W. Rutherford then went upon the land, and remained until the summer of 1881. After this F. M. Murray was upon the land for a while, but it does not clearly appear how long he remained. Perhaps others of the heirs at law of James S. Murray were upon parts of the land for a year or two at a time, but none of them attempted a permanent residence. In 1886 several of the heirs of the vendor, Cooper, who had died in 1880, conveyed their interest in the land now in controversy, along with many hundred other acres besides, to F. M. Murray, and in 1886 others of these heirs conveyed to him, so that, when these deeds were made, he was the ostensible owner of seven-eighths interest in six hundred or seven hundred acres of land, including the three hundred acres now in controversy. On May 2, 1890, F. M. Murray conveyed his seven-eighths interest in the lands thus acquired to William Baird, S. C. Baird, and Jeremiah Smith. On

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March 25, 1902, these persons conveyed the same interest to Benjamin D. Bartlett. On April 3, 1902, William Baird acquired the remaining one-eighth interest from the heirs of the persons representing that outstanding interest in the Cooper estate, and on January 8, 1903, he conveyed it to Benjamin D. Bartlett. On April 1, 1905, Benjamin D. Bartlett conveyed all of the lands to J. S. Bartlett, and in the same year the latter conveyed an undivided one-third interest to H. M. La Follette, and a portion was also conveyed by him to the La Follette Coal, Iron & Railroad Company.

On July 7, 1906, the complainant, joined by her husband, Wyatt F. Campbell, filed the present bill against the said J. S. Bartlett, H. M. La Follette, and the La Follette Coal, Iron & Railroad Company, in which she asserted her right to a one-eighth undivided equitable interest as heir at law of James S. Murray, deceased, in the land covered by the title bond made to her father in 1861, on the ground that she had never consented to the surrender of that bond, expressing a willingness to pay out of her share any of the purchase money remaining unpaid. She learned about the year 1880, or shortly thereafter, that the title bond had been surrendered. She made no complaint until 1890, when she told her brother, F. M. Murray, that she still claimed her one-eighth interest. She also made the same statement, in substance, to William Baird, about the time he was negotiating his purchase of the land. In 1890 she employed an attorney to bring suit; but he was the son-in-

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law of F. M. Murray, and after a conference with the latter he declined the employment. After this she slept upon her rights until the present bill was filed, sixteen years later, or twenty-six years after the surrender of the title bond, and forty-two years after her father's death. She has, however, all the time been under cover-
ture.

The present defendants had no actual knowledge of complainant's claim when they purchased and obtained deeds in fee to the lands; but there was, perhaps, sufficient reference to a title bond or bonds, in the deeds made by the Cooper heirs to F. M. Murray, which were in their chain of title, to start them upon an inquiry which would have led to a discovery of the existence of the title bond of 1861, and of the fact that complainant had no hand in surrendering that bond, and that she was still claiming an interest in the land; that is, if we can assume that the parties indicated, the Coopers and F. M. Murray, were willing to make true replies to inquiries, and would have done so. The title bond was not registered; but it seems to have been handed, with the unpaid notes, as papers no longer useful, to F. M. Murray, by the Coopers, when they made the deeds to him, and the bond was by him handed over to William Baird, along with the deed made to him and his co-purchasers. The Cooper deeds did not describe any special title bond, but stated in general terms that title bonds had been executed on the lands and never paid for, and that they did not warrant against such incumbrances.

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When the title bond was executed the land was worth only \$1 an acre, because of little value for agricultural purposes and unavailable for mineral uses, being in a mountainous country, remote from railroads. Within recent years a railroad has been built into that country, and coal discovered upon the land, close to transportation facilities. As a consequence, the land is now worth \$50 per acre, an increase in value of fifty-fold.

In disposing of the case, we shall assume, without deciding, that the facts stated were sufficient to fix the defendants with constructive notice, under our registration laws (*Teague v. Souder*, 121 Tenn., 132, 114 S. W., 484), though it is worthy of remark that after such a great length of time as had ensued when Bartlett bought he might perhaps assume that any outstanding title bonds, not already enforced, had been abandoned, and, in that event, his defense of innocent purchaser would be available. We shall not consider the general subject of estoppels against married women arising out of conduct on their part deceiving and misleading persons relying thereon, upon different phases of which we have cases. *Galbraith v. Lunsford*, 87 Tenn., 89, 9 S. W., 365, 1 L. R. A., 522; *Pilcher v. Smith*, 2 Head, 208; *Cooley v. Steele*, Id., 605; *Fletcher v. Coleman*, Id., 384; *Stephenson v. Walker*, 8 Baxt., 289; *Howell v. Hale*, 5 Lea, 405; *Berrigan v. Fleming*, 2 Lea, 271; *Fogg v. Yeatman*, 6 Lea, 580; *Anderson v. Akard*, 15 Lea, 192; *Gates v. Card*, 93 Tenn., 341, 24 S. W., 486; *Johnson City v. Wolfe*, 103 Tenn., 277, 52 S. W., 991;

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Bruce v. Goodbar, 104 Tenn., 638, 645, 58 S. W., 282. And see *Duckwall v. Kisner*, 136 Ind., 99, 101, 35 N. E., 697; *Catherwood v. Watson*, 65 Ind., 576; *Minnich v. Shaffer*, 135 Ind., 634, 34 N. E., 987.

We are of the opinion, however, that the controversy must be decided adversely to complainant, on the ground that the present bill is in effect one to enforce a specific performance of the contract of sale evidenced by the title bond. Such rights must be enforced with reasonable promptness, even where the writing does not in terms make time of the essence of the contract, especially when there has been a great increase in the value of the property. *Smith's Heirs v. Christmas*, 7 Yerg., 565. In that case eight months was held too long a delay, although the complainants were infants, who had succeeded to the rights of their father, who had died before the maturity of the contract. The uncle of the infants assumed to act in their behalf after the death of their father. He testified that on the 1st day of January, the time when the purchase money was due, under the contract, he did not consider it an advantageous contract. It seems to have been thought better then to lie by and speculate on the advantages of the contract. The property might rise, or it might fall, in value, or remain stationary. In either of the latter two events, the friends of the infants did not intend to execute the contract. The court said they could not, after waiting eight months and willfully neglecting to do anything, and by their backwardness authorizing the inference

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that they did not intend to do anything, and after the property had increased threefold, come into a court of equity and get the contract enforced. "It would be most inequitable if they could," continued the court, "and it is not believed that, in any case circumstanced as this is, has a court of equity ever decreed in favor of a complainant. It is true that the simple fact of a rise in the value of the property is not a ground for refusing a specific performance. 2 Ver., 42, 43, 280. Nor do we consider that, in a contract like this, where there is no condition that it shall be void on the nonperformance of one of the parties, time is of the essence of the contract; but time in such a case is material, and if there be no excuse for nonperformance, according to the stipulation of the bargain, and the party has willfully lain by, until the circumstances of the estate have changed and a performance would be ruinous to the other party, a specific performance will not be decreed. In this case Christmas gave up an advantageous contract with Camp, which he had made on the faith of this. Lands in that section of the county had greatly increased in value before an offer was made in behalf of the complainants to perform this contract, during all which time their friends had willfully forborne to do anything in the business. They came now too late to obtain the assistance of this court."

In another opinion in the same case the English doctrine was stated to be: "When a court of equity holds that time is not of the essence of the contract, it pro-

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ceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretense and evasion. *Dolorch v. Rothschild*, 1 Sim. & Stuart, 590. Where the contract upon its face is to be void in case of default, there the defendant may so consider it, though, if he waive the default, the circumstances remaining the same, he will be bound by the contract. Where there is any change in the circumstances, either of the estate or the parties, as the falling in of lives, or any great rise or fall in value, a specific performance will not be decreed. Where the delay has operated injuriously to the defendant, or where his object in making the contract has thereby been defeated, a performance will be refused. *Crofton v. Ormsby*, 2 Sch. & Lef., 604. Where the party has lain by and speculated, or has trifled and shown a backwardness in carrying the contract into effect, no decree will be made in his favor. 12 Ves., 228; *Guest v. Humphrey*, 5 Ves., 818. See, also, Sugden on Vend., 277, 278, 281; Jeremy, 461, 462." Speaking further to the same matter the court said: "If this be the state of the English law, what ought to be the rule in this country? In England land is of a permanent and fixed value. There is but very little fluctuation in price, so that what is a fair valuation in one time is generally so a year or two afterwards. This rule, then, that time is not of the essence of the contract, restricted as it is by the modern doctrines of the court, may have pretty extensive application in practice in that country, consistently with the

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substantial rights of the parties. But as often as the application of the rule would not subserve the ends of justice, the courts have departed from this rule and refused to enforce the contract. In this country, which is comparatively but newly settled, where the price of land depends upon the tide of emigration, the settling and improving of particular sections, the springing up of towns, and other causes operating to change the price in particular neighborhoods, as well as larger sections, the rule, restricted as it should be, would be found of much less practical utility. In this country, time should be regarded as a circumstance of decisive importance, fixing the necessity upon the negligent party of observing that the defendant has waived the default, or that no inconvenience or loss will arise to him, and that the property is substantially of the same value. This is the view taken of the subject by Chancellor Kent in *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.), 379, 7 Am. Dec., 484, with whose general course of reasoning in that case I entirely concur."

Upon the subject of the infancy of the complainants, the court said: "But it is said that laches cannot be imputable to these complainants, because they are infants. Upon this part of the case we cannot better express the views we entertain than in the language of the chancellor. 'It is true,' he says, 'in many cases this answer to the objection of time elapsed would be good for some reasonable delay on the part of the infants. In all cases, depending on the question of abandonment

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simply, or backwardness and trifling conduct, they would be considered as standing on more favorable grounds than adults. But I cannot assent to the position that this is to be allowed as an excuse, when the fault or delay, from whatever cause it may have arisen, other than the acts of the defendant, has been the means of defeating the object of the defendant, or where the property has greatly risen or fallen in value in the meantime. If we adopt such a rule, while we relieve one party from an inconvenience, we do great injustice to the other. In cases of this kind a court of equity will leave the parties to their legal remedies, and will let the loss fall where Providence has placed it. This view of the question is supported and enforced by that able Chancellor Lord Reddesdale, in the case of *Griffin v. Griffin*, 1 Sch. & Lef., 352. Infants, in such cases, must always act by their friends, and their rights will be saved or lost by the activity or negligence of those whom nature has placed around them for their protection. If this should not be the case, the infants would be protected until maturity, which might be for twenty years or more, and, in the meantime, both parties to the contract might be dead, and the situation of the parties interested, and the value and circumstances of the property, entirely changed.' If the infancy of the complainants be an excuse for a delay of eight months, it may, for the same reason, excuse a delay of twenty years. The injustice such a rule would inflict the other party could not be endured. But in this case the friends of

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these infants were alive to their interests. They forebore to do anything so long only as they believed it would be for the benefit of the infants to forbear; but when they find, by the sudden rise of property, that it would be for their interest to act, we find them promptly doing all they could to secure the speculation. As the notes were at last executed and tendered by the administrators, they could have been as easily executed and tendered by them at any previous time, so that there is no pretense for an excuse for the delay growing out of the infancy of the complainants. Had Smith's death, just before the time the contract was to be completed, been attended with any embarrassment or difficulty, so that the friends of the children knew not how to act, or were unable to act in the business, and if so soon as they reasonably could have done so, advice had been taken, and an offer made to perform the agreement on their part, this would have been a good excuse for delay; and although the lands might have risen in value, still the contract would have been enforced. But this was not the case. The administrator, whose duty it was to act, was appointed at the October court. He was acquainted with the nature of the contract, and knew that it devolved on him to perform it on the part of Smith; but, not believing it an advantageous one on the part of Smith's children, he purposely declined doing anything until the great rise in the value of the land convinced him that it would be greatly to their advantage to have the bargain executed, and then he was will-

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ing to put himself to great personal inconvenience to secure it for them. If, after all this, the infancy of these complainants should be held sufficient to excuse this delay, under the circumstances of this case, the friends of other infants will have the strongest temptation to commit the most deliberate frauds upon persons with whom the ancestors of such infants may contract. They may purposely hold back for years, until some favorable change in the estate shall occur, and then come forward and offer to perform, and plead the infancy of the children as an excuse for the delay." See, also, on the general subject, *Mann v. Dun*, 2 Ohio St., 187; *Brown v. Haines*, 12 Ohio, 1; *Henry v. Conn*, Id., 193; *Scott's Ex'rs v. Barber's Heirs*, 14 Ohio, 547. See, also, *Benedict v. Lynch*, 1 Johns. Ch., 370, 7 Am. Dec., 484, 1 L. Ed. N. Y. Ch. Rep., 175, and note. In *Henry v. Conn*, the court held that, where the purchase money becomes due in the lifetime of the vendee, the infancy of his heir will not excuse delay in making payment, so as to induce the court to decree performance against the vendor, after a great lapse of time. This rule was approved and followed in the subsequent case of *Scott's Ex'rs v. Barber's Heirs*, supra.

In the case we have before us, the purchase money had long been due when the father of complainant died. In this class of cases, at least, we think the same rule should apply to a married woman as to an infant, to say nothing of the more stringent rule laid down in *Smith's Heirs v. Christmas*, supra. We are, however, further

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of opinion that after a great lapse of time, and a large increase in the value of the property, the rule of *Smith's Heirs v. Christmas* is a proper one to be applied, even to married women. Certainly the natural inhibition upon infants, arising out of their immaturity, is no less than the supposed restraint of coverture in cases of married women, preventing them from setting up claims to valuable property. The underlying reason in each instance is the public policy that supports the rule.

The present decision is confined to cases wherein specific performance is sought. We do not impair the authority of *Dodd v. Benthall*, 4 Heisk., 601, and *Moore v. Walker*, 3 Lea, 656, and similar cases wherein a married woman seeks to set aside deeds made by her, or to recover property the title to which has been vested in her.

On the grounds stated, we are of the opinion that the decree of the chancellor dismissing the bill should be affirmed.

The chief justice, while concurring, is of the opinion that the court should go further, and authoritatively determine that, after such a lapse of time, one examining the records in the register's office, and seeing such a statement concerning title bonds as appears in the deeds referred to, would have the right to presume conclusively that such title bonds had been abandoned, and were hence no longer in the way of his making a purchase. In brief, he is of the opinion that after such a length of time, recitals of the character above referred to would not put the purchaser upon inquiry.

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JAMES W. DEADERICK v. STATE.

(Knoxville. September Term, 1909.)

1. **TRESPASS.** Cutting timber on land in possession of another under color of title cannot be defended under superior title, when.

The statute (Shannon's Code, sec. 6496, subsec. 7) declaring it to be a misdemeanor to trespass on the lands of another by cutting down or in any other manner destroying valuable timber thereon exceeding fifty cents in value, with a view to convert the same to his own use, was intended to protect the actual possession of land held under color of title from forcible invasion, and to prevent violence, bloodshed, and breaches of the peace, resulting from rival claimants of lands attempting to take forcible possession, and to compel resort to the courts for the determination of the validity of titles. It is, therefore, no defense that those who authorized and employed the defendant to cut the timber had the superior title to the land so possessed by another.

Code cited and construed: Sec. 6496, subsec. 7 (S.); sec. 5403, subsec. 7 (M. & V.), sec. 4652, subsec. 7 (T. & S. and 1858).

Case cited and approved: Dotson v. State, 6 Cold., 545.

2. **MALICIOUS MISCHIEF.** In prosecution for defacing building, possession only need be proved.

In a prosecution for injury to the property of another, under the statute (Shannon's Code, sec. 6496, subsec. 1) making it a misdemeanor to wantonly injure or deface any building, or fixture attached thereto, etc., belonging to another, possession only need be proved. (*Post*, p. 227.)

Code cited and construed: Sec. 6496, subsec. 1 (S.); sec. 5403, subsec. 1 (M. & V.); sec. 4652, subsec. 1 (T. & S. and 1858).

Cases cited and approved: State v. Mathes, 3 Lea, 37; Malone v. State, 11 Lea, 703.

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3. TRESPASS. Party in possession may maintain action for.

A party in actual possession of land can recover in an action for trespass to the same. (*Post*, p. 227.)

Cases cited and approved: *Bailey v. Massey*, 2 Swan, 169; *Large v. Dennis*, 5 Sneed, 597; *Allen v. McCorkle*, 3 Head, 182.

4. SAME. Constructive possession resulting from actual possession of part under color of title will sustain prosecution for trespass.

Possession, by occupation or inclosure, of part of the land covered by the possessor's title papers, constitutes actual possession by construction of the entire premises within the boundaries described and defined in such title papers, so as to maintain a prosecution for the cutting or destroying of the valuable timber thereon, as well as to put in operation the statutes of limitations, and make a sale of the land by another champertous, and to enable such possessor to maintain an action of forcible entry and detainer against a trespasser, and a replevin suit for the timber cut and removed. (*Post*, pp. 227-229.)

Code cited and construed: Sec. 6496, subsec. 7 (S.); sec. 5403, subsec. 7 (M. & V.); sec. 4652, subsec. 7 (T. & S. and 1858).

Cases cited and approved: *Pickens v. Delozier*, 2 Humph., 400; *Hebard v. Scott*, 95 Tenn., 467; *Green v. Coal & Coke Co.*, 110 Tenn., 35; *Mansfield v. Northcut*, 112 Tenn., 536; *Lieberman v. Clarke*, 114 Tenn., 117.

Case cited, distinguished, and overruled in part: *Dotson v. State*, 6 Cold., 545.

FROM COCKE.

Appeal in error from the Circuit Court of Cocke County.—G. MC. HENDERSON, Judge.

Deaderick v. State.

H. N. CATE and H. H. INGERSOLL, for Deaderick.

ATTORNEY-GENERAL CATES, for State.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

The plaintiff in error was convicted of the offense of malicious mischief, committed in cutting and removing timber from the lands of the Stony Mountain Land Company, in Cocke county, Tenn., under section 4652, subsec. 7, of the Code (Shannon's Code, section 6496), declaring it to be a misdemeanor "to trespass on the lands of another by cutting down or in any other manner destroying valuable timber thereon exceeding fifty cents in value with a view to convert the same to his own use, unless the offender be traveling or moving along any road and by accident or otherwise require the same for his own immediate use."

The defenses made in the trial court, and here relied upon, are that Brown and others had the superior title to the lands upon which the timber was cut, and that plaintiff in error was employed and authorized by them to cut and remove it, or, if plaintiff in error's employers did not have the superior title, the trespass was committed under color of title and a claim of right, and in the *bona fide* belief that they did have such title, and the right of possession.

The case was tried much like an action of ejectment. The state introduced the title papers of the Stony

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Mountain Land Company, deraigning title from the State of Tennessee. The defendant introduced the title papers of Brown and others, showing title from the State of North Carolina. The state also offered evidence of possession by the Stony Mountain Land Company, and its predecessors in title, for the purpose of perfecting its title under the statutes of limitations and raising presumption of a grant; while the defendant offered proof of the coverture of his employers during that period.

The lands claimed by the parties, the Stony Mountain Land Company and Brown and others, consist of a tract of five thousand acres, uninclosed and in timber, with the exception of two or more inclosures containing twelve or more acres, of which the Stony Mountain Land Company and those under whom it holds have had the actual possession, claiming to the extent of the boundaries defined in its title papers, for some fifteen or twenty years, and perhaps longer. Brown and others, the employers of the plaintiff in error, had never had any actual possession. They were advised, and believed, they had the superior title, and employed the plaintiff in error to cut timber upon the uninclosed land, which he did in good faith, believing that his employers had the right to authorize him to do so. He and his employers knew of the adverse possession, and the timber was cut, evidently, for the purpose of compelling action on the part of the Stony Mountain Land Company, and to test the title of the claimants.

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The contentions of the plaintiff in error are unsound, and present no valid defense to the charge of which he was convicted. Validity of title and good faith of the trespasser are not material inquiries in cases of this character.

The object of the statute, upon which plaintiff in error was convicted, is to protect actual possession of land held under color of title from forcible invasion, and to prevent breaches of peace, violence, and bloodshed, resulting from rival claimants of lands attempting to take forcible possession, and to compel resort to the courts for determination of the validity of titles.

In *Dotson v. State*, 6 Cold., 545, it is said:

"This statute is not intended to constitute our criminal courts tribunals for the trial of ejectment suits at the expense of the State. It is not intended to settle the title to real estate, but is enacted in pursuance of the policy, apparent in our statutes of forcible entry and detainer and other statutes, to protect the actual possession of real estate against unlawful and forcible invasion, and to remove occasion for acts of violence and breach of the peace.

"To support an indictment under the statute above recited there must have been, by the express term of the statute, a trespass—such wrongful invasion of the possession of another as would enable the party in possession to maintain the action of trespass for the injury. The possession invaded must be the possession of some other person than the defendant."

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In a prosecution for injury to the property of another, under subsection 1 of this statute, possession only need be proved. *State v. Mathes*, 3 Lea, 37; *Malone v. State*, 11 Lea, 703.

The party in actual possession can recover in an action for trespass to land. *Large v. Dennis*, 5 Sneed, 597; *Allen v. McCorkle*, 3 Head, 182; *Bailey v. Massey*, 2 Swan, 169.

The Stony Mountain Land Company was in actual possession of the land from which the timber was cut. Possession, by occupation or inclosure, of part of the land covered by its title papers, was actual possession, by construction, of the entire premises within the boundaries defined in those papers. *Pickens v. Delozier*, 2 Humph., 400; *Mansfield v. Northcut*, 112 Tenn., 536, 80 S. W., 437; *Lieberman v. Clarke*, 114 Tenn., 117, 85 S. W. 258, 69 L. R. A., 732.

This is the way, as a rule, actual possession is held of all timber lands in this State. It is virtual possession, and effective to give notice to all persons of the occupation and adverse claim of the party so holding. It is sufficient to put in operation the statutes of limitations, make a sale champertous, sustain an action of forcible entry and detainer against trespasser, and replevin for timber cut and removed. *Lieberman v. Clarke*, supra; *Mansfield v. Northcut*, supra; *Hebard v. Scott*, 95 Tenn., 467, 32 S. W., 390; *Green v. Cumberland Coal & Coke Co.*, 110 Tenn., 35, 72 S. W., 459.

Were the law as contended for plaintiff in error, all

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persons, in possession of lands under valid titles, could be compelled to resort to expensive litigation to establish their title at the instance of any trespasser, who could connect himself with one of the many duplicate grants which have unfortunately been issued, covering large bodies of land in all parts of the State held under older and superior titles. The statute justly protects them from burdens of this nature.

The plaintiff in error committed the trespass alleged against him with full knowledge of the actual adverse possession of the land. The case is clearly made out, and he was properly convicted.

The case of *Dotson v. State*, supra, is relied upon to support the contentions of the plaintiff in error. It is there said that title in the defendant, or color of title with the *bona fide* belief that it is his property, is a good defense in a prosecution under this statute. This, however, is in conflict with the construction given the statute in the previous part of the opinion, which we have quoted, and was only intended for the facts of that case. There it appears the prosecutor resided upon the land, having a part of it inclosed; but it does not appear that he had a paper title covering the uninclosed part, upon which the timber was cut. The defendant also resided upon the land, having an inclosure, and claimed under a grant covering the place where he cut the timber. The parties were both in possession, provided the prosecutor had color of title extending his boundaries to the portion in dispute. Upon these facts, the defendant did not

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invade the possession of the prosecutor, and was not guilty.

This case, *Dotson v. State*, so far as it may be in conflict with the construction of the statute herein declared, is erroneous, and is overruled.

The judgment of the circuit court is affirmed.

State, ex rel., v. Parks.

STATE, *ex rel.* J. P. WEBB, *v.* W. M. PARKS.

(*Knoxville*. September Term, 1909.)

1. **PARDON.** Governor's pardon of a justice convicted of official oppression, and fined and removed from office, cannot restore the office lost as on such impeachment.

Where a justice of the peace indicted for official oppression is convicted of the offense, and is, by the judgment of the court, fined and removed from office, and forever thereafter disqualified from holding office under the laws and constitution of the State, the governor's pardon of the fine, and also attempting to render said judgment null and void and of no effect, except as to costs, was ineffective to restore the office, because the removal of the justice from office was as upon conviction on impeachment, and the governor's pardoning power does not extend to judgments of conviction in impeachment cases.

Code cited and construed: Secs. 6717, 6721 (S.); secs. 5607, 5611 (M. & V.); secs. 4813, 4817 (T. & S. and 1858).

Code cited as inapplicable: Secs. 3655, 6066 (S.); secs. 2800, 5000 (M. & V.); secs. 1994, 4228 (T. & S. and 1858).

Constitution cited and construed: Art. 3, sec. 6; art. 5, secs. 1-5.

Cases cited and approved: *Carpenter v. State*, 6 Bax., 535; *State v. Cassetty*, 3 Tenn. Cas., 120; and authorities in other jurisdictions cited on page 238 of the opinion.

Case cited as inapplicable: *Moore v. State*, 9 Yerg., 353.

2. **REMOVAL FROM OFFICE.** Upon conviction of a justice of the peace for official oppression without a proceeding by bill in the nature of a quo warranto.

Where a justice of the peace indicted for official oppression is convicted of the offense, the judgment to the extent of removing him from office and forever thereafter disqualifying him from

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holding office under the laws and constitution of the State, was as upon conviction on impeachment, and was properly rendered as part of the same proceeding; and it was, therefore, unnecessary, in order to obtain the justice's removal from office, that the State, after his conviction, proceed against him by a bill in the nature of a *quo warranto* under section 5165 to 5187, inclusive, of Shannon's Code. (*Post*, pp. 237, 238.)

Code cited and construed: Secs. 5165-5187, 6717, 6721 (S.); secs. 4146-4168, 5607, 5611 (M. & V.); secs. 3409-3431, 4813, 4817 (T. & S. and 1858).

Constitution cited and construed: Art. 5, secs. 1-5.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County. T. M. McCONNELL, Chancellor.

VANCE & CARDEN, for complainant.

SHEPHERD, FLEMING & SHEPHERD, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The present bill was filed to remove the defendant from the office of justice of the peace, claimed by him, on the ground that he was an intruder without authority of law, and that the complainant was the real incumbent of the office. The bill was met by a demurrer, which was sustained by the chancellor. Thereupon an

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appeal was prayed and prosecuted to this court.

The facts stated in the bill are these :

That on the 2d day of August, 1906, the relator was elected a justice of the peace for the Sixth civil district of Hamilton county for the full term of six years, and was duly commissioned by the governor, and entered upon the discharge of his duties; that at the January term, 1909, of the criminal court of Hamilton county he was indicted, jointly with Thomas Light, a deputy sheriff, and W. G. Sears, constable for the Sixth district, on the charge of official oppression, in four cases—each indictment containing the same statement of facts—under section 6717 of Shannon's Code, and that he was convicted in all four of the cases, and in each of them was entered a judgment as follows, viz.:

“Again came the attorney-general, and defendants in person, and the same sworn jury, to wit: . . . And they, having heard all the proof, arguments of counsel, and charge of the court, do upon their oaths say the defendants are guilty of oppression, as charged in the indictment, and fix their punishment at payment of \$50 each. It is therefore adjudged that the defendants pay a fine of \$50 each, together with all costs, and, in default thereof, be confined in the workhouse of Hamilton county until same is worked out, as prescribed by law. Execution shall issue against defendants for costs. It is the further order, judgment, and decree of this court that the defendant J. P. Webb be removed from his office, to wit, justice of the peace for this county,

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and that defendant W. G. Sears be removed from his office, to wit, constable of Hamilton county, and that defendant Thomas Light be removed from the office of deputy sheriff of Hamilton county, and all of said named defendants are forever hereafter disqualified from holding office, under the laws and constitution of the State of Tennessee."

It is further alleged in the bill that the election commissioners of Hamilton county, on the — day of May, 1909, called an election to choose relator's successor; that on the 5th day of May, 1909, after the election commissioners had called the election as aforesaid, but before it had been held, the governor of the State pardoned the relator, and the said Light and Sears, of said offense of official oppression; that said pardon, after fully stating the governor's reasons for granting it, contained the following language: "Therefore I, Malcolm R. Patterson, governor as aforesaid, by virtue of the power and authority in me vested, do hereby relieve of the fines and pardon the said J. P. Webb, Thomas Light, and W. G. Sears of the said offense; and I do further authorize and direct that said judgment be rendered null and void and of no effect, except as to costs." It is further alleged that, immediately upon receipt of this pardon, relator served written notice upon the election commissioners that the pardon had been received, and that his office had not been legally vacated, and therefore no election for said office could be legally held;

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that this notice, however, was disregarded by the commissioners, and they proceeded to hold an election as called on the 8th day of May, 1909, which resulted in the election of W. M. Parks, who received a commission from the governor, and at the date of the filing of the bill was, without authority of law, undertaking to perform the duties of the office.

The demurrer which was interposed by the defendant, Parks, raised the point that, under the facts stated, there was a vacancy in the office of justice of the peace for the Sixth district of Hamilton county, created by the judgment, and that the pardon of the governor did not restore relator to his office, and that the pardon could not render "null and void and of no effect" the whole judgment.

We think the decree of the chancellor was correct.

The pardoning power in this State does not extend to the relief of defendants from judgments rendered in impeachment proceedings. This power is expressly excluded in the grant of power upon the subject of pardons, as contained in article 3, sec. 6, of the constitution. That section reads that the governor "shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment." That the judgment which deprived relator of his office was an impeachment proceeding, in so far as it referred to that subject, is apparent from article 5, sec. 5, of the constitution. In order to properly understand this latter section, it should be construed in connection with sections 1, 2,

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3, and 4. Section 1 lodges the power of impeachment in the house of representatives. Sections 2 and 3 provide the method of trial. Section 4 mentions the officers who may be impeached. That section reads as follows:

"Sec. 4. The governor, judges of the supreme court, judges of the inferior courts, chancellors, attorneys for the State, treasurer, comptroller, and secretary of State shall be liable to impeachment, whenever they may, in the opinion of the house of representatives, commit any crime in their official capacity, which may require disqualification; but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law. The legislature now has, and shall continue to have, power to relieve from the penalties imposed upon any persons disqualified from holding office by the judgment of the court of impeachment.

Section 5 reads:

"Sec. 5. Justices of the peace, and other inferior officers, not hereinbefore mentioned, for crime or misdemeanor in office, shall be liable to indictment in such court as the legislature may direct; and upon conviction shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law."

The latter section prescribes the mode of impeachment applicable to justices of the peace and to other officers therein named. Pursuant to this section the

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legislature passed sections 6717 and 6721 of the Code, under which the judgment complained of was rendered against the relator. These sections read:

"Sec. 6717. If any person by color of his office, willfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding \$1,000, or imprisonment in the county jail not exceeding one year."

"Sec. 6721. If any judicial, ministerial, or executive officer in this State is prosecuted for misdemeanor in office under the provisions of this Code, and duly convicted, he shall, in addition to the punishment prescribed for such offense, be removed from his office, and shall forever thereafter be disqualified from holding office, under the laws and constitution of the State."

It was proper, therefore, that the judgment should be framed in the manner set out in the bill. It was clearly contemplated in section 5, art. 5, of the constitution, that in the same proceeding in which the guilt of the accused should be ascertained he should be removed from office and disqualified from ever thereafter holding office. While it was contemplated that the officers mentioned in section 4, art. 5, should be impeached when necessary before the legislature, and also indicted and punished in the criminal court, as to justices of the peace and other inferior officers, the two proceedings were united into one by section 5. This is the clear meaning of the provisions of the constitution. The question has not previously been adjudicated in this State,

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but this construction is clearly implied in *Carpenter v. State*, 6 Baxt., 535, and *State v. Cassctty*, 3 Tenn. Cas., 120. We are referred to *Moore v. State*, 9 Yerg., 353, as an adverse authority; but upon a careful examination of that case we do not see that it has any bearing upon the question before us.

It is insisted by relator's counsel that after the conviction of the relator, under section 6717, it was necessary, in order to remove him from office, that he should be proceeded against by a bill in the nature of a *quo warranto* under secs. 5165 to 5187 of Shannon's Code. From what has been said, it is apparent that this is a mistaken view. Certainly there could be no need of any additional proceedings after the very ground of removal had been ascertained by proceedings under an indictment. Costs and time were avoided by a judgment in that case removing the officers. No good reason can be conceived for an additional proceeding. This was evidently the view of the framers of the constitution, when section 5 of article 5 was drawn.

We have had submitted to us, by counsel for relator, a very learned and interesting argument upon the effect of pardons in general under the common law of England and of this country. We have examined this argument with care, but do not find it necessary to write at length upon the phase of the case covered by it, because, as already stated, the pardoning power in this State does not apply to impeachment proceedings at all. The disabilities so imposed can be relieved only by the legislature, as shown by section 4, art. 5, which

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is construed with section 5. It is proper to remark, also, that in our opinion section 3655 and section 6066 do not apply to such proceedings.

And, even aside from the provisions of our constitution, it appears from the weight of authority that a pardon cannot restore to a former incumbent an office which he has forfeited. *Ex parte Garland*, 4 Wall., 380, 18 L. Ed., 366; *In re Spenser*, 5 Sawy., 195, Fed. Cas. No. 13234; *Cook v. Chosen Freeholders*, 26 N. J. Law, 326; *same controversy*, 27 N. J. Law, 637; *Baum v. Clause*, 5 Hill (N. Y.), 199; *Roberts v. State*, 30 App. Div., 106, 51 N. Y. Supp., 691; *same case*, 160 N. Y., 217, 54 N. E., 678; *In re Attorney*, 86 N. Y., 563; *Com. v. Fugate*, 2 Leigh (Va.), 724; *Edwards v. Com.*, 78 Va., 39, 49 Am. Rep., 377; *State v. Carson*, 27 Ark., 469; *Nelson v. Com.*, 128 Ky., 779, 109 S. W., 337, 16 L. R. A. (N. S.), 272. *Jones v. Board of Registrars*, 56 Miss., 766, 31 Am. Rep., 385, is cited as an authority to the contrary; but the opinion in that case, while stating very broadly the effect of a pardon, still recognizes the distinction above mentioned, to the effect that a pardon will not restore one to an office which he has forfeited. The proposition is fully supported in the common-law authorities referred to in *Ex parte Garland*, viz.: 4 Blackstone, Com., 402; 6 Bacon's Abr., tit. "Pardon;" Hawk., book 2, c. 37, secs. 34, 54. And see these authorities discussed in *Re Spenser*, supra.

It results that there is no error in the decree of the chancellor; and it must be affirmed, with costs.

BOWDRE BROWN v. CRYSTAL ICE COMPANY.¹

(Knoxville. September Term, 1909.)

1. **MANDAMUS.** To compel inspection of corporate books by a stockholder; mandatory injunction may be used as remedy, but mandamus is more direct.

The remedy of a stockholder in a corporation to obtain an inspection of the corporate books, where permission to inspect them is denied, is by mandamus, though a mandatory injunction may be made effectual in securing for a stockholder an examination of the books, by forbidding the officers and agents of the corporation from interfering with him in such examination; but the *mandamus* is a much more direct remedy, and can be conditioned by such restrictions as the court may deem necessary or proper to prevent injury to the books or undue inconvenience to the officers and agents of the corporation in the discharge of their duties. (*Post*, pp. 241, 242, 246.)

Cases cited and approved: *Bates v. Taylor*, 87 Tenn., 319; *Iron Cos. v. Pace*, 89 Tenn., 707; *State, ex rel., v. Williams*, 110 Tenn., 549; *Weißenmayer v. Bitner*, 45 L. R. A., 457, note and cases cited.

Case cited and distinguished: *Hawkins v. Kercheval*, 10 Lea, 535.

2. **SAME. Same.** Mandatory injunction to compel inspection of corporate books is not concurrent with mandamus, which is a prerogative writ.

The remedy by mandatory injunction in chancery to compel a corporation to permit a stockholder to inspect the corporate books is not concurrent with the remedy by mandamus, which is a peculiar one, and, although the court of chancery, by Acts

¹As to right of stockholder to inspect books of corporation and remedies to enforce right, see note to *Weißenmayer v. Bitner* (Md.), 45 L. R. A., 446.

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1877, ch. 97, has been given concurrent jurisdiction with the court of law, yet the remedy by *mandamus* has remained substantially the same in both courts as to the practice and the class of cases to which it applies, and, in its inherent nature, this remedy has preserved in chancery the same marks it had in the law court, and in both courts, the remedy by *mandamus* is regarded as in the nature of a prerogative writ, to be granted only in the high discretion of the court, and to be applied only to those cases as to which no other remedy exists. (*Post*, pp. 242-246.)

Acts cited and construed: Acts 1877, ch. 97.

Numerous Tennessee cases on the general subject of *mandamus* are collected in the opinion, on pages 243-245.

3. SAME. Bill in the name of the State; amendment inserting name of State when objection is made for its absence.

Since the writ of *mandamus* is in the nature of a prerogative writ, the more logical rule is to require the bill to be presented in the name of the State; but where objection is made on the ground that the name of the State was not used, the court may, upon application, allow an amendment, inserting the name of the State. (*Post*, pp. 246, 247.)

Cases cited and approved: *Whitesides v. Stuart*, 91 Tenn., 710; *Weinberg v. Brewing & Malting Co.*, 21 Wash., 451, 47 L. R. A., 208-212, and authorities cited.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court. T. M. McCONNELL, Chancellor.

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R. B. COOKE, for complainant.

PRITCHARD & SIZER, for defendant.

PER CURIAM.

The bill in this case was filed by a stockholder of the defendant corporation to obtain an inspection of the books. After alleging his character of stockholder, the complainant avers the president assured him that the dividend for the current year would be "eight times the amount of the fixed charges," while in fact only a 5 per cent. dividend was declared; that, being greatly desirous of finding the cause of the disparity, he applied to the officers of the corporation for leave to inspect the books; that this was granted him, in a gingerly way, but, when he took from his pocket a small memorandum book and attempted to make some memoranda, the corporation books were taken from him, and he was not permitted to proceed further. The bill thereupon closed with the following prayer: "Let a mandatory injunction be served on the defendant, its officers and agents, requiring them to allow complainant to examine the books of said company, and to make such notations as he chooses to make thereof. Let the defendant, its officers and employees, be enjoined from interfering with complainant in his examination of said books, and on the hearing let said injunction be made perpetual. Grant general relief."

The defendant demurred to the bill on the ground

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that complainant's remedy for the case stated therein was a petition for mandamus, and that the court had no jurisdiction to grant the injunctive relief sought.

The demurrer was sustained by the chancellor; but, on appeal to the court of civil appeals, the decree of the chancellor was reversed, and the cause remanded for answer and further proceedings. The case was then brought to this court by *certiorari*.

We are of the opinion that the court of civil appeals was in error. By the great weight of authority the relief sought must be obtained through mandamus proceedings. *State, ex rel., v. Williams*, 110 Tenn., 549, 75 S. W., 948, 64 L. R. A., 418; Clark on Corporations, sec. 135; Clark & Marshall on Corporations, pp. 1653-1655; High on Extraordinary Legal Remedies, sec. 308; Cook on Corporations, secs. 513, 514; Thompson on Corp., sec. 4431; note to *Weißenmayer v. Bitner*, 45 L. R. A., at page 457, and cases cited; 26 Am. and Eng. Enc. (2d Ed.), p. 955; 26 Cyc., 349.

It is insisted that the remedy sought in the bill is concurrent with the remedy by *mandamus*; that since the act of 1877 (Acts 1877, p. 119, c. 97), giving the chancery court jurisdiction of all cases at law, except actions for unliquidated damages to persons, property, or character, no distinction should be made, but that any remedy under the control of the chancery court, proper to effectuate the purpose, may be used; and that a mandatory injunction is specially adapted to the purpose. We do not think that this suggestion is a sound one. The remedy by *mandamus* is a peculiar one, and,

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although the court of chancery has been given concurrent jurisdiction with the court of law, yet the remedy by *mandamus* has remained substantially the same in both courts as to the practice and the class of cases to which it applies. It is true that in a court of law the complaining party comes in by petition, while in the court of chancery this pleading is called a bill, yet in substance and in language they are the same. Likewise, in the court of chancery, as well as at law, an alternative writ issues and a return is made as at law, and the subsequent proceedings are about the same. Likewise, in its inherent nature, this remedy has preserved, in the court of chancery, the same marks it had in the court of law. It is regarded in both courts as in the nature of a prerogative writ, to be granted only in the high discretion of the court, and to be applied only to those cases as to which no other remedy exists.

We have in this State quite a large number of cases upon the subject, showing a variety of applications. It is frequently used to effectuate the jurisdiction of this court over inferior courts. The cases upon this subject are: *State v. Cooper*, 107 Tenn., 202, 64 S. W., 50; *State v. Sneed*, 105 Tenn., 711, 58 S. W., 1070; *Vanvabry v. Staton*, 88 Tenn., 334, 12 S. W., 786; *State v. Brockwell*, 16 Lea, 683; *Alexander v. State*, 14 Lea, 88; *Ing v. Davey*, 2 Lea, 276; *Newman v. Justices of Scott County*, 1 Heisk., 787; *State v. Hall*, 6 Baxt., 3; *Whitfield v. Greer*, 3 Baxt., 78; *Galloway v. Fleing*, 2 Tenn. Cas., 615; *State v. Elmore*, 6 Cold, 528.

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Other cases, showing together quite a range of subjects, are: *State, ex rel., v. Enloe*, 121 Tenn., 347, 117 S. W., 223; *Cantrell v. Golden*, 120 Tenn., 204, 109 S. W., 1154; *State, ex rel., v. Taylor*, 119 Tenn., 229, 104 S. W., 242; *State v. Thompson*, 118 Tenn., 571, 102 S. W., 349, 20 L. R. A. (N. S.), 1; *Marler v. Wear*, 117 Tenn., 244, 96 S. W., 447; *State v. Willett*, 117 Tenn., 334, 97 S. W., 299; *State v. Alexander*, 115 Tenn., 156, 90 S. W., 20; *State v. Board of Inspectors*, 114 Tenn., 516, 86 S. W., 319; *State v. Williams*, 110 Tenn., 549, 75 S. W., 948, 64 L. R. A., 418; *State v. Justices of Wayne County*, 108 Tenn., 259, 67 S. W., 72; *State v. Hart*, 106 Tenn., 269, 61 S. W., 780; *State v. Wilbur*, 101 Tenn., 211, 47 S. W., 411; *Donaldson v. Walker*, 101 Tenn., 236, 47 S. W., 417; *Harris v. State*, 96 Tenn., 496, 34 S. W., 1017; *Williams v. Dental Examiners*, 93 Tenn., 620, 27 S. W., 1019; *Whitesides v. Stuart*, 91 Tenn., 710, 20 S. W., 245; *Insurance Co. v. House*, 89 Tenn., 438, 14 S. W., 927; *Iron Companies v. Pace*, 89 Tenn., 707, 15 S. W., 1077; *Bates v. Taylor*, 87 Tenn., 319, 11 S. W., 266, 3 L. R. A., 316; *Morgan v. Pickard*, 86 Tenn., 208, 9 S. W., 690; *State v. Mayor, etc., of Nashville*, 15 Lea, 697, 54 Am. Rep., 427; *Robison v. Hawkins*, 12 Lea, 450; *Meadows v. Nesbit*, 12 Lea, 486; *Hawkins v. Kercheval*, 10 Lea, 535; *Yost v. Gaines*, 10 Lea, 576; *State v. Whitworth*, 8 Lea, 594; *State v. Puckett*, 7 Lea, 709; *State v. Nashville, Chattanooga & St. L. R. Co.*, 7 Lea, 15; *State v. Marks*, 6 Lea, 12; *Morley v. Power*, 5 Lea, 691; *State v. Miller*, 1 Lea, 596; *Beas-*

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ley v. Ferriss, 1 Lea, 461; *Memphis Appeal Publishing Co. v. Pike*, 9 Heisk., 697; *Puckett v. Hyde*, 6 Heisk., 194; *Mobile & O. R. Co. v. Wisdom*, 5 Heisk., 125, 155, 157; *Rainey v. Aydelette*, 4 Heisk., 122; *Jonesboro, Fall Branch & Blair's Gap Turnpike Co. v. Brown*, 8 Baxt., 490, 35 Am. Rep., 713; *State v. Anderson County*, 8 Baxt., 249; *White's Creek Turnpike Co. v. Marshall*, 2 Baxt., 104, 121, 124; *City of Memphis v. Bethel*, 3 Tenn. Cas., 205; *Loague, Mayor, etc., v. Coward*, 3 Tenn. Cas., 693; *State v. City of Memphis*, 2 Tenn. Cas., 185; *Beck v. Puckett*, 2 Tenn. Cas., 490; *State v. Sinking Fund Commissioners*, 1 Tenn. Cas., 490, 503; *Winters & Cross v. Burford's Heirs*, 6 Cold., 328; *Williams v. Saunders*, 5 Cold., 60, 80, 81; *State v. Hall*, 3 Cold., 255; *Saffrons v. Ericson*, 3 Cold., 1; *Nelson v. Justices of Carter County*, 1 Cold., 207; *Justices of Williamson County v. Jefferson*, 1 Cold., 420; *Felts, Sheriff, etc., v. Mayor, etc., of Memphis*, 2 Head., 650; *Battle v. Rawles*, 2 Sneed, 576; *Johnson v. Lucas & Gaither*, 11 Humph., 306; *Hess v. Crawford*, 8 Humph., 609; *Justices of Cannon County v. Hoodenpyle*, 7 Humph., 145; *Caldwell v. Watson*, 6 Humph., 498; *Barnhart v. Neisler*, 6 Humph., 493; *Lacy v. Anderson*, 6 Humph., 495; *Gillespie v. Wood & Douglass*, 4 Humph., 437; *Thomason v. Justices, etc.*, 3 Humph., 233; *Copeland v. Woods*, 2 Humph., 330; *Dunlap v. Smith*, 4 Yerg., 509; *Hardin County Court v. Hardin*, Peck, 291; *Bradford v. Treasurer of East Tennessee*, Peck, 425; *King v. Hampton*, 3 Hayw., 59, 60; *Kennedy v. Woolfolk*, 1 Overt., 453.

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In none of these cases is there an intimation of any similarity between this remedy and that by injunction, or that they are at all interchangeable. In two of them the injunction was united with the *mandamus* to hold matters *in statu quo* until the *mandamus* could be made operative. *Iron Companies v. Pace*, supra, and *Bates v. Taylor*, 87 Tenn., 319, 11 S. W., 266, 3 L. R. A., 316. And such practice is no doubt useful and proper in some cases. It is true that the mandatory injunction might be made effectual in securing for a stockholder an examination of the books, by forbidding the officers and agents of the corporation from interfering with him in such examination; but the *mandamus* is a much more direct remedy, and can be conditioned by such restrictions as the court may deem necessary or proper to prevent injury to the books or undue inconvenience to the officers and agents of the corporation in the discharge of their duties (*State, ex rel., v. Williams*, supra), and we deem it best to adhere to the recognized practice.

It is insisted that in *Hawkins v. Kercheval*, 78 Tenn., 535, the remedy administered was a mandatory injunction. This is a mistaken view. The court held in that case that the relief sought under the original bill by injunction could not be granted. The relief that was granted was under the amended bill, which the court construed to be an application for the writ of *mandamus*.

A question has been made as to whether it is neces-

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sary to present the bill in the name of the State. It was so held in *Whitesides v. Stuart*, 91 Tenn., 710, 20 S. W., 245. This seems the more logical rule, since the writ is in the nature of a prerogative writ (*State, ex rel., Weinberg, v. Pacific Brewing & Malting Co.*, 21 Wash., 451, 58 Pac., 584, 47 L. R. A., 208-212, and authorities cited); but in most of our cases, prior to *Whitesides v. Stuart*, the name of the State was not used, and the same is true of some of the subsequent cases. No doubt the court would lend an easy ear to an application for amendment, so as to insert the name of the State in any case where objection is made on that ground.

On the grounds stated, the judgment of the court of civil appeals must be reversed, and the judgment of the chancellor, dismissing the bill, must be affirmed, with costs.

Snyder v. Mystic Circle.

MRS. ANNIE SNYDER v. THE SUPREME RULER OF THE
FRATERNAL MYSTIC CIRCLE.¹

(*Knoxville*. September Term, 1909.)

1. **INSURANCE.** Wife named as beneficiary under a fraternal benefit certificate and continuing payments after divorce is entitled to insurance, when; waiver.

Where the charter of a social and benevolent corporation declared its object to be to unite fraternally persons of proper age and character for beneficial and protective purposes, to provide for the payment to its members, or their families, widows, heirs, blood relatives, or other dependents, benefits in case of death, without any restrictive words, without any affirmative provision that the benefit fund should be appropriated to none other than those enumerated, and without any provision for the forfeiture of a benefit certificate payable to the wife of a member upon her obtaining a divorce from the member, the divorced wife is entitled to recover on the certificate, upon the death of the member, where the certificate was previously issued to the member for the benefit of his wife who subsequently obtained a divorce, and who was thereafter induced by the representations of the highest executive officer of the corporation, made by him with knowledge of the facts, to continue the payment of the assessments and dues on the unchanged certificate, the receipt of which by the corporation, with knowledge of the divorce, operated as a waiver of the rule or law of the corporation. (*Post*, pp. 251-264.)

Cases cited and approved: *Lane v. Lane*, 99 Tenn., 639; *Manley v. Manley*, 107 Tenn., 191; *Alfsen v. Crouch*, 115 Tenn., 352; *Maneely v. Knights*, 115 Pa., 305; *White v. Brotherhood*, 124

¹ For effect of divorce on wife's right to insurance on her husband's life, see note to *Overhiser v. Mutual Life Ins. Co. (Ohio)*, 50 L. R. A., 552.

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Iowa, 293; Sheehan v. Journeymen, 142 Cal., 489; Society v. Blue, 120 Ill., 121; Lindsey v. Society, 84 Iowa, 734; Story v. Association, 95 N. Y., 474.

2. **SAME. Same. Fraternal benefit insurance corporation may waive its by-law as to divorce by the reception of assessments and dues with full knowledge.**

Where a by-law of a social and benevolent corporation provided that if the beneficiary designated in its benefit certificate is a husband or wife of the member and they (the member and beneficiary) should be divorced, then the benefit shall be payable to a certain other class of persons, and where the beneficiary is the wife of the member, and she afterwards obtains a divorce from the member, and thereafter informed the highest executive officer of the corporation of the fact, and that she had the certificate in her possession whereupon, such officer induced her, by his representations as to her rights thereunder, to continue the payment of the assessments and dues on the unchanged certificate, the receipt of which by the corporation, with knowledge of the divorce, operated as a waiver of such by-law, because the corporation which made the by-law could waive it. (*Post*, pp. 258-261, 263, 264.)

3. **SAME. Same. Same. Fraternal benefit insurance corporation refusing payment upon one distinct ground is estopped to insist upon a forfeiture of the certificate upon another ground.**

Where a social and benevolent corporation declined to pay a benefit certificate on the sole ground that the member's "death was due solely and wholly to the excessive use of narcotics, alcoholic, vinous, and malt liquors, and the excessive use of morphine and other opiates," in violation of a rule of the corporation, it will be estopped in the beneficiary's suit thereon to assert or insist on a forfeiture of the certificate because the wife of the member, who was designated as the beneficiary, thereafter obtained a divorce, as well as to make other defenses. (*Post*, pp. 264, 265.)

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Cases cited and approved: Insurance Co. v. Thornton, 97 Tenn., 1; Insurance Co. v. Hancock, 106 Tenn., 513; Smith v. Insurance Co., 107 Mich., 270; McCormick v. Insurance Co., 163 Pa., 184.

4. ESTOPPEL. Ground for conduct before suit cannot be changed after suit, when.

Where a party gives a reason for his conduct and decision touching anything involved in controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different ground. (*Post*, p. 265.)

Cases cited and approved: Ault v. Dustin, 100 Tenn., 366; Railroad v. McCarthy, 96 U. S., 258.

5. INSURANCE. Evidence stated and held to show that death was not caused by the use of drugs and liquors.

In an action on a benefit certificate, void where the death of the member was caused by the excessive use of certain drugs and intoxicating liquors, the evidence is stated and held to show that the death of the member was not caused by the use of such drugs and liquors. (*Post*, pp. 254, 255, 257, 258, 266-268.)

6. CONSTITUTIONAL LAW. Statute imposing penalty for failure to pay insurance losses does not impair obligation of contract.

The statute (Acts 1901, ch. 141), imposing a penalty or additional liability of twenty-five per cent upon insurance companies for the failure to pay insurance losses, is not void as impairing the obligation of the contract of insurance. (*Post*, p. 268.)

Acts cited and construed: Acts 1901, ch. 141.

Constitution construed, though not cited: Art. 1, sec. 20.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County. T. M. McCONNELL, Chancellor.

Snyder v. Mystic Circle.

PRITCHARD & SIZEE, for complainant.

D. L. SNODGRASS and T. C. LATIMORE, for defendant.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The defendant is a corporation duly organized under the laws of the State of Pennsylvania, with its principal office in the city of Philadelphia, in that State, and with subordinate lodges, or agencies, located in different States of the Union. The corporation is social and benevolent in character; its object, as indicated in its charter, being "to unite fraternally white persons of proper age and good social and moral character . . . for beneficial and protective purposes, collecting dues and assessments from its members, to provide for the payment to its members, or their families, widows, heirs, blood relatives, or other dependents, benefits in case of sickness, disability, or death of its members, in compliance with its constitution, laws, and regulations."

On the 23d of November, 1887, the corporation issued to Charles C. Snyder, a resident of Chattanooga, and a member of one of its lodges, a benefit fund certificate, or policy, by which it bound itself, on certain conditions therein set forth, at the death of the assured, upon the proof thereof, to pay to the present complainant, at that time and for many years thereafter his wife, or,

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in case of her death prior thereto, to his children, a sum not exceeding \$3,000.

On or about the 1st of May, 1908, Chas. C. Snyder, died, in Brooklyn, N. Y., where he was then domiciled, and soon thereafter proofs of loss were furnished by complainant to the defendant, and payment of the certificate was demanded by her. This demand being refused, the present bill was filed.

The defenses to this claim, set up in the answer, are:

First. That it had been determined by the supreme medical examiner of the defendant corporation, whose determination of the question, under the laws of the association, was final, that "the health of the assured had become impaired and his death was caused directly or indirectly by the use of narcotics," and the assured had stipulated in the application, on the faith of which the certificate was issued, that in such case the defendant should "not be responsible under the contract."

Second. That the complainant had been divorced from the assured prior to his death, and by the express terms "of the constitution and laws of the order" was *ipso facto* excluded from all further interest in this certificate.

The record shows that, many years after the issuance of the certificate in question, the complainant obtained a divorce from the assured, and was given the custody and control of the children born of their marriage, and afterwards, to wit, on the 25th of June, 1904,

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that she wrote defendant a letter, in which she advised defendant of this divorce, and that for ten years prior thereto she had paid the assessments on this certificate, and making inquiry as to whom the money provided for therein, in the event the assessments were kept up, would be paid on the death of the assured. To this letter, under date of June 28, 1904, F. H. Duckwitch, the supreme mystic ruler—the highest officer of the association, and in charge of its affairs as such—made a reply to the complainant, in which he said, in substance, that under the laws of the order Charles C. Snyder, being a member, had “the absolute right” to change the beneficiary, within certain limitations; that “as the certificate now stands” it would be payable, on his death, to the complainant, “provided, of course, that the assessments were paid up,” and in case of complainant’s death “to his children.” This letter concludes with the following paragraph: “I assume, from what you write, that you are in possession of this certificate. If so, it might be difficult for him to secure a new certificate, unless he should take the position that the old certificate was lost, and he would make affidavit to that effect, which, under our law, would entitle him to a new certificate.”

To this letter the complainant replied, under date of August 18, 1904. In this reply she stated as follows: “I have the certificate in my possession, and intend to keep it. If any one tries to change the beneficiary, saying that the affidavit is lost, or destroyed,

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be kind enough to communicate with me before you take any action in the matter. . . ." In response to this letter the supreme mystic ruler wrote complainant that he would file her letter with the petition for membership, in order that the clerks of the association might be advised of her request "to be notified of any application for change of beneficiary."

Following this correspondence, and relying on the statements of the chief officer of the corporation as to her rights in the premises, complainant, as shown by her, with much sacrifice, continued to pay all assessments, or dues, on this certificate up to the death of her former husband, on the 1st of May, 1908.

As has been stated, proofs of loss were promptly submitted by the complainant soon thereafter. In these, in answer to the question as to the cause and manner of his death, she stated it was due to suicide by "inhalation of illuminating gas." In response to a request to state the habits of the deceased "with reference to the use of spirituous or fermented liquors," she replied, "He did drink prior to leaving Chattanooga," and in answer to the question, "Did the deceased use morphine, opium, chloral, or other drugs or narcotics?" she said, "I think he used morphine."

On receipt of these proofs the supreme recorder of the defendant corporation wrote complainant, informing her that her claim was "not on its face a valid one," and that in accordance with the constitution and laws of the order an opportunity was given her to ap-

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pear before the supreme executive committee and present such evidence as she might have to establish its validity. In this letter there was set out a copy of resolutions passed by that committee, in which were recited provisions of the laws of the order to the effect that no benefit should be paid on account of the death of any member when his health had become impaired, or death had resulted, directly or indirectly, from the use of opiates, or alcoholic, vinous, or malt liquors, or when, at the time of his death, the member shall be addicted to the excessive use of alcoholic, vinous, or malt liquor. It was then stated in one of the resolutions that "from the proofs of death presented it appears that Charles C. Snyder was at the time of his death addicted to the excessive use of narcotics, or alcoholic, vinous, or malt liquors, on which account the claim presented by his beneficiary should not be approved." The resolutions then provided that the complainant "shall appear in person, or by attorney, or both, before the supreme executive committee at the office of the defendant in Philadelphia, Pa., on Friday, July 17, 1908, . . . and offer further proof in support of her claim as she may deem necessary or advisable."

In answer to this letter Mrs. Snyder wrote the supreme recorder that if Mr. Snyder's health had become impaired by the use of liquor, or if he was accustomed to use of narcotics, she did not know it, and did not intend so to state in the proofs of death; that Snyder had been away from Chattanooga for a number of years,

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and she had no personal knowledge of his personal habits, but when she saw him last he showed no evidence that he used narcotics, or that his health had become impaired by the use of intoxicating liquors. She stated, further, that it was impossible for her to appear in Philadelphia, either in person or by attorney, on July 17th, but that she would send such statements as she could before that date, and requested that a copy of the proofs she had furnished be sent her.

In answer to this letter the supreme mystic ruler wrote complainant: "We are unable to furnish you a copy of the proofs of death, as they are on file with the supreme medical director, at Columbus." He stated that: "Upon investigation we found that Mr. Snyder was a morphine and cocaine fiend, and that after his death many vials, labeled 'Cocaine,' 'Morphine,' and 'Chloroform,' were found in his rooms. We also ascertain that he used alcoholic liquors to excess, and that he had been a heavy drinker for more than fifteen years before he went to Brooklyn, N. Y. Further, that he was again married in Brooklyn, in July, 1904, and that the widow, his last wife, is living." He then calls complainant's attention to the agreements in the "Application for Beneficial Membership" made by Snyder, to the effect that "if his health should become impaired, or if he should die from the excessive use of" liquors, narcotics, etc., the defendant would not be liable on the certificate, and stated that complainant might submit

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such proofs as she was able to secure tending to establish the justness of her claim, by affidavits or other documentary evidence, and suggested that she also furnish a certified copy of her decree of divorce from Charles C. Snyder. In conclusion, the letter states that "any proof that you may submit will receive careful consideration by the supreme executive committee."

Soon after this, and in obedience to the suggestion made, the complainant secured and sent to the defendant, at its office in Philadelphia, the affidavits of twenty-one different persons, who claimed to have known the deceased intimately during a portion of, or all, the years that he lived in Brooklyn, and who stated that during their acquaintance with him his habits were temperate in the use of intoxicating liquors, and that from their associations with him and to the best of their knowledge he did not use narcotics. In addition, she submitted her own affidavit, in which, among other things, she states that she had not seen or talked with Snyder, or had any correspondence with him, from the time she obtained her divorce, in June, 1901, up to the date of his death, in May, 1908, and that she knew nothing about his habits during that period; that he never drank nor used narcotics to such an extent as to impair his health during the time she knew him, and if he used either after the separation she did not know it; and that she did not intend, by anything she said in the proofs of loss, to indicate that she knew what his habits were. She also set out in detail the information

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that she had as to the circumstances attending his death, from which she drew the conclusion, as she says, that the assured committed suicide because of his financial troubles and disappointments over the failure of his eldest son to go to New York and live with him.

On August 10, 1908, the supreme recorder wrote complainant that her claim "as the alleged beneficiary" under the certificate in question had been rejected by the supreme executive committee "as not being a valid one under the constitution and laws of the order and contract of membership;" and on the day following the general counsel wrote complainant at length, explaining the action which had been taken. He stated that the supreme executive committee, "after careful consideration of all the proofs presented, decided that the defendant was not liable on the certificate," for the reason "that said member's [Charles C. Snyder's] death was due solely and wholly to the excessive use of morphine and other opiates." He then referred to the correspondence which had taken place between himself as supreme mystic ruler and complainant, in June, 1904, already referred to, and stated, in substance, that under the laws of the order no divorced wife could be a beneficiary, and that, therefore, she could not be a beneficiary under the certificate in question, even if the claim had been a valid one.

Leaving out of view, for the time being, other matters for consideration, the first question presented is: Is the complainant, as the divorced wife of Charles C.

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Snyder, entitled to recover on this certificate? It is insisted by the defendant that she is not; and to sustain this insistence the charter, the constitution and by-laws of the order, and certain authorities, are invoked.

That the complainant was rightfully a beneficiary at the time of the issuance of this certificate, and continued to be such at the date of her divorce, is beyond question. After the divorce was obtained, the beneficiary was not changed by the assured, as he had the right to do under the laws of the order, and the defendant corporation continued the certificate in her name, and with the full knowledge of the divorce she was encouraged by its chief executive officer to believe that, in the event of the death of the assured without change, if dues and assessments were paid by her, she would be entitled to receive the money provided for in the certificate upon proper proofs of loss. Accepting the assurance of the supreme officer of the corporation to be made in good faith, she continued to pay these dues and assessments up to the death of Charles C. Snyder. Certainly, on these facts, there is a strong equity in her favor, which the defendant should not be permitted to repel, unless it can interpose some legal objection which a court is without power to disregard.

It will be observed, in reading that portion of the charter which affects this question, hereinbefore set out, that only in general terms is the "object" of the corporation set out; that is, the collection of dues and assessments "from its members to provide for the pay-

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ment due its members, or their families, widows, heirs, or other dependents, benefits," in case of "sickness, disability, or death."

It may be conceded that, if the charter had in express terms restricted the application of the benefit fund to the class named, or, in other words, had affirmatively provided that it should be appropriated to none others, then it might be argued that payment to complainant upon her personal claim as the divorced wife of the assured could not be enforced. In such a case we can well understand that a recognition of the claim of the divorced wife by the superior officer of the order, followed by the receipt of assessments by it, would not avail to repel the defense of *ultra vires*. The authorities largely relied upon by the defendant corporation announce and enforce this principle.

But there are no restrictive words in this charter. At the time of the issuance of the certificate to Charles C. Snyder the complainant was his wife, and as such had an insurable interest in his life. The defendant issued the certificate, payable to her as such wife, as unquestionably it had the power to do. Its charter made no provision for a forfeiture of her right as beneficiary in the event of her divorce from the assured. No demand was made by the defendant for a surrender of this certificate on account of the changed relations of the beneficiary to the assured, and no alteration was made in it, and no intimation ever given to her that she had, after her divorce, no claim on the order. To the

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contrary, in recognition of an existing interest, with full knowledge that she no longer sustained the relation of wife, its supreme mystic ruler induced her to continue the payment of dues and assessments on this certificate, at the expense of much personal sacrifice, and the defendant received and appropriated the sums so paid for a term of years, and until the death of the assured. Certainly, we repeat, if there is any sound ground for an equitable estoppel upon which this claim can be rested then it should be found, and complainant given relief.

It is true that some authorities can be found which hold, with the contention of the defendant, that in the face of even such general terms, lacking words of limitation or description, as are to be found in this charter, it would be an unauthorized diversion of a trust fund to award the money, represented by this certificate, to the complainant. The courts in which this class of cases are found have adopted a rigid rule of construction. 1 Bacon on Benefit Societies, secs. 243-245. On the other hand, other courts have adopted a "more liberal view," and, as we think, altogether a more reasonable one, and with these this court, as is said in *Manley v. Manley*, 107 Tenn., 191, 64 S. W., 8, has ranged itself.

That case involved a controversy between the surviving mother of a deceased member of an order, known as the "Brotherhood of Locomotive Firemen," and his widow and children, as to a fund represented by a cer-

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tificate issued to the member and payable to his mother. It was there insisted by the widow, for herself and children, that the fund from which the claim in question was paid was "established to provide substantial relief to members and their families, in the event of death or total disability," and that the mother of the deceased was not within the classes provided for. The provision just quoted constitutes a part of section 47 of the constitution of that order.

In reply to this insistence it was said by the court: "It will be observed that there are no restrictive words in section 47. The terms used are general, and declare the purpose for which this beneficiary department is established, without fixing or undertaking to fix beyond recall a class to which, in case of death of a member, the money provided for must of necessity go. While the clear implication is that the fund raised is for the "substantial relief of members and their families, in the event of death or total disability," yet there are no words depriving the member of the right to designate any member of his family he may see proper as a beneficiary, or which gives one member of his family a fixed right superior to that of another." It was held that the mother was entitled to the benefit of that fund.

Among the cases referred to as supporting the conclusion of the court is that of *Maneely v. Knights of Birmingham*, 115 Pa., 305, 9 Atl., 41, in which the same liberal construction was given to a charter clause of one of these beneficial associations, which stated

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that the purpose of the corporation was the maintenance of a society to benefit "the widows and orphans of deceased members." A person other than a widow or orphan of a deceased member, to whom a certificate has been issued, when demanding payment, was met by a defense that the contract was *ultra vires*, and it was so held by the lower court. In reversing this judgment it was said: "We think this is too narrow and strained a view to take of this section of the charter. While it is true that the general purpose of the corporation is there stated, . . . it must be observed that this is only the statement of a general purpose. . . . There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans." Supporting this view are to be found many cases. Among these may be cited *Lane v. Lane*, 99 Tenn., 639, 42 S. W., 1058; *Alfsen v. Crouch*, 115 Tenn., 352, 89 S. W., 329; *White v. Brotherhood of American Ycomen* (1904), 124 Iowa, 293, 99 N. W., 1071, 66 L. R. A., 164, 104 Am. St. Rep., 323; *Sheehan v. Journeymen*, 142 Cal., 489, 76 Pac., 238; *Benefit Society v. Blue*, 120 Ill., 121, 11 N. E., 331, 60 Am. Rep., 558; *Lindsey v. Western Mutual Aid Society*, 84 Iowa, 734, 50 N. W., 29; *Story v. Williamsburg, etc., Mutual Benefit Asso.*, 95 N. Y., 474.

It is urged, however, that one of the laws adopted by the defendant, and in existence at the time of the issuance of the certificate to C. S. Snyder, provided that

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"if at the time of the death of a member, who has designated as his beneficiary a person of class second [in the present case the wife], the dependency required by the laws of the order shall have ceased. . . . or if the designated beneficiary is a husband or wife, and they should be divorced upon the application of either party, . . . then the benefits shall be payable to person, or persons, mentioned in class first (section 11, law 1), if living," and that this provision necessarily defeats the claim of complainant. We think the answer to this contention is that the order which made this law could waive it, and that by the receipt of assessments and dues by the defendant after the divorce, and with full knowledge of that fact, it was waived. It is true that Mr. Duckwitch, the supreme mystic ruler, states that in a moment of forgetfulness as to this provision he wrote the letter to the complainant of date June, 1904, hereinbefore referred to. We grant that he was not able, by virtue of his position as chief executive of this order, either by direction or indirection, to set aside or suspend the operation of one of its laws. But this is not the point. His knowledge of the divorce secured by the complainant was that of the association, and its receipt of assessments and dues thereafter constituted the waiver in law insisted upon.

There is another ground, however, which we regard as conclusive on this point as against the defendant. It will be seen, from the statement hereinbefore made,

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that the representatives of the order did not decline to pay this claim because of the divorce of the complainant from Chas. C. Snyder, the assured, but on the other and distinct ground that his "death was due solely and wholly to the excessive use of narcotics, alcoholic, vinous, and malt liquors, and the excessive use of morphine and other opiates." Having taken this ground with knowledge of this provision in its laws, and of the fact of the divorce, it is now estopped to assert this latter fact as being a forfeiture of complainant's interest in this certificate. 3 Cooley's Insurance Briefs, p. 2680; *Insurance Company v. Thornton*, 97 Tenn., 1, 40 S. W., 136; *Insurance Co. v. Hancock*, 106 Tenn., 513, 62 S. W., 145, 52 L. R. A., 665; *Smith v. German Insurance Company*, 107 Mich., 270, 65 N. W., 236, 30 L. R. A., 368; *McCormick v. Insurance Co.*, 163 Pa., 184, 29 Atl., 747.

This is but the application to insurance cases of the well-established rule "that, when a party gives a reason for his conduct and decision touching anything involved in the controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different consideration." *Ault v. Dustin*, 100 Tenn., 366, 45 S. W., 981; *Railway Co. v. McCarthy*, 96 U. S., 258, 24 L. Ed., 693.

This rule equally disposes of the contention that the determination of the medical director of the defendant against this claim was conclusive on the complainant, and also as to the effect under the by-laws of the failure of the complainant to appeal from the decision of the executive committee to the general counsel.

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Independent, however, of the views above expressed, we think that the present suit could be maintained by the complainant in her own name, having the legal title by virtue of this certificate in question to the fund provided for in it, and that, under section 14, her recovery would inure to the benefit of her children. It is not necessary, however, in order to save this claim in favor of complainant, that this ground should be taken, as we are satisfied that the views already presented are sound, and that she is entitled in her own right to this recovery.

This leaves open only the question as to whether the death of the assured was due to the excessive use of narcotics, and of vinous and malt liquors. That his death was the result of suicide, produced by the inhalation of illuminating gas, is beyond controversy. It is not insisted, however, that the death thus caused was within the inhibition of the policy. The laws of the order prevented the interposition of the defense of suicide, where a member had continued in good standing for a period of ten years or more, as was the case of the deceased.

An examination of the record shows that the overwhelming weight of the testimony, coming from witnesses who knew the deceased intimately for fifteen or twenty years, and some of them up to the time of his death, is that he was a moderate drinker, and was not addicted to the use of narcotics in any form. His death, on this record, can be attributed to the fact that the deceased had become desperate from financial straits, and on account of his conduct, whatever it may have been,

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which had separated from him the present complainant and their four children, and the consciousness of the utter waste of what might otherwise have been possibly, a brilliant life. The statement of the complaint, in the proofs of loss, with regard to his drinking and to the use of morphine, were honestly made by her. She had not seen him for about fourteen years before the making of these proofs. While they lived together as man and wife, as is shown, he did drink moderately, and, knowing this, she answered as to the habits of the deceased as to the use of spirituous or fermented liquors, that "he did drink prior to leaving Chattanooga." In response to the question as to whether he used morphine, etc., she made reply, as has been seen, "I think he used morphine." This last answer is explained by her in an affidavit submitted to the defendant, when seeking a settlement of her claim, and before the institution of the present suit, as well as in her deposition, by the statement that prior to their separation, while in the city of Chicago, upon one occasion she found a white substance in the room occupied by herself and her then husband, and, apprehensive that it might be a narcotic, she sent it by one of their children to a druggist for his opinion, and the child came back and reported that it was morphine, and that this was the incident that she had in her mind at the time she made this particular answer. She stated, further, that she knew nothing since their separation of the habits of the deceased.

We regard this explanation as entirely satisfactory,

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and consistent with good faith in pressing the present claim.

The chancellor not only gave the complainant a decree for the amount of the certificate and interest, but allowed her in addition thereto, 25 per cent. thereon, under chapter 141, p. 248, Acts of 1901. It is insisted that this act, in imposing this additional liability on the defendant, is void, in that it impaired the obligation of the contract in question. This question has been presented and determined against this insistence in both published and unpublished opinions. We are entirely satisfied with the holding heretofore made. In all respects the decree of the chancellor is affirmed.

Adcock v. Houk.

T. J. ADCOCK *et al.* v. JOHN C. HOUK *et al.*

(*Knoxville*. September Term, 1909.)

1. **INJUNCTION.** Chancery cannot enjoin election officers from issuing certificate of election, nor the officers from assuming their functions.

The chancery court has no jurisdiction or power to enjoin election officers from issuing a certificate of election, or to restrain public officers from assuming their functions, even though it be alleged that there was fraud in the election sufficient to vitiate it, and though the suit was not instituted by an opposing candidate. (*Post*, pp. 273, 274.)

2. **CONTESTED ELECTIONS.** Bill of officers seeking to hold over and to prevent newly elected officers from assuming office presents a case of contested election.

A bill filed by the old board of mayor and aldermen, seeking to hold over and to prevent the new board from assuming office and discharging the duties thereof, on the ground that the election was void by reason of certain frauds committed in the progress thereof, which made the result incurably uncertain, presents a contested election case, pure and simple. (*Post*, pp. 274, 275.)

See headnote, 6.

3. **CHANCERY JURISDICTION.** Cannot be conferred by injunction suit whose very life is the injunction and which involves a contested election of which chancery has no jurisdiction.

A distinction must be taken between the jurisdiction of the chancery court and the propriety of applying a particular remedy; but the rule does not apply so as to give chancery jurisdiction where the very life of the bill is the injunction sought by means of which the complainants seek to retain possession

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of the offices, after their time has expired, and to prevent the defendants, who have a *prima facie* title, from assuming the duties of the office, where such bill presents a contested election case which the chancery court has no jurisdiction to try. (*Post*, pp. 274, 275.)

4. **CONTESTED ELECTIONS.** Election and other contests over offices of mayor and aldermen is in the circuit court, and not in chancery.

The jurisdiction of an election contest or other contest over the offices of mayor and aldermen is in the circuit court, and not in the chancery court, for the reason that no tribunal is in terms designated by statute for the trial of such cases, and no tribunal is provided for the induction of these officers, and because the statute provides, in substance, that the circuit court has jurisdiction in any case left unprovided for. (*Post*, pp. 274, 275.)

Code cited and construed: Sec. 6063 (S.); sec. 4997 (M. & V.); sec. 4225 (T. & S. and 1858).

Cases cited and approved: Conner v. Conner, 8 Bax., 11; Baker v. Mitchell, 105 Tenn., 610.

5. **SAME.** The incumbent, the inducting court, or the unsuccessful candidate may contest the successful candidate's election and right to the office.

The incumbent of an office, though not a candidate for re-election, may object to the induction of the person holding the certificate of election and contest the matter with him on the ground that the election was void, or such contest may be raised by the court itself, upon which is devolved the duty of inducting the officer, or an unsuccessful candidate may maintain a contest with his successful opponent on the ground that the latter was disqualified to hold the office, and hence that the election was void; for the validity of an election may be determined in a contested election case. It is not required that there must be opposing candidates involved in the litigation before there can be a contested election case. (*Post*, pp. 275, 276.)

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Cases cited and approved: *Marshall v. Kerns*, 2 Swan, 68; *McCraw v. Harralson*, 4 Cold., 34; *Lewis v. Watkins*, 3 Lea, 174, 181, 182; *Maloney v. Collier*, 112 Tenn., 78, 91-94.

6. **SAME.** Defined to be going behind the returns to ascertain who was elected, or to determine whether there has been any legal election.

Where the questions raised by the litigation necessitate going behind the returns, the case presented is an election contest, whether the judgment to be rendered under the pleadings be that the one or the other of two contesting parties has been elected, or that there has been no legal election at all. (*Post*, pp. 275, 276.)

See headnote, 2.

Cases cited and approved: *Marshall v. Kerns*, 2 Swan, 68; *McCraw v. Haralson*, 4 Cold., 34; *Lewis v. Watkins*, 3 Lea, 174, 181, 182; *State, ex rel., v. Gossett*, 9 Lea, 644; *Maloney v. Collier*, 112 Tenn., 78, 91-94.

7. **SAME.** Cases involving annexation of corporate territory, county subscriptions to railroad companies, and removal of county seats are not contested election cases.

Cases involving the annexation of new territory to a city, county subscriptions to railroad companies, and the removal of county seats are controversies not falling under the classification of contested election cases, but, on the contrary, under the class of cases wherein the chancery court restrains public officers from the exercise of unconstitutional powers, where such court's jurisdiction is invoked on the ground that the people had not given their consent to or directed the proposed action by the constitutional prerequisite and required majority; and the means by which the will of the people is ascertained and their consent obtained is merely by accommodation or convenience called an "election." (*Post*, pp. 276-278.)

Cases cited and approved: *Winston v. Railroad*, 1 Bax., 69; *Morris v. Nashville*, 6 Lea, 337; *Lindsay v. Allen*, 112 Tenn., 659, 660, 661; *Catlett v. Railroad*, 120 Tenn., 702.

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8. **MANDAMUS.** Officer sought to be coerced by *mandamus* to recognize another as an officer or to obey some supposed mandate may question the same.

Where it is sought by *mandamus* to compel an officer to recognize some other person as an officer, or to obey some mandate supposed to be the mandate of the people rendered in the form of an election, it necessarily results that the officer or person so sought to be coerced must have the right to question whether the person put forward as an officer to be received is in fact an officer, or whether the presumed direction is a real direction of the people. (*Post*, pp. 276-278.)

Cases cited and approved: Pucket v. Bean, 11 Helsk., 600; Lawrence v. Ingersoll, 88 Tenn., 52.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
HUGH L. McCLUNG, Chancellor.

WEBB & BAKER, SHIELDS, CATES & MOUNTCASTLE,
LUCKEY, FOWLER & ANDREWS, and JOHN W. GREEN,
for complainants.

THOMAS L. CARTY, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed on June 7, 1909, in the chancery court of Knox county, by the board of

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mayor and aldermen of the city of Lonsdale, made such by the election held the first Thursday in June, 1907, for a term of two years, against the new board elected on the first Thursday in June, 1909. The old board was composed of T. J. Adcock, mayor, J. M. Wood, recorder, and Robert Snow, Sam Milwee, Joe Ford, Sam De Armond, Sam Johnson, and F. E. Stanford, aldermen. The new board is composed of M. M. Copenhaver, mayor, W. B. Ailor, recorder, H. E. Chrisenberry, W. H. Davis, C. L. Householder, J. A. Bean, S. G. Sentell, and C. O. Gentry, aldermen. It is alleged in the bill that various acts of intimidation were used against non-resident property holders, who had a right to vote under the charter of the city, whereby a sufficient number of them were restrained from voting to change the result of the election, and to render the election incurably uncertain, and hence that there was no free election, such as the law contemplates and provides. It is therefore further alleged that the election was void. It was alleged that on the face of the returns the defendants were elected, and that unless restrained the election commissioners would meet at the courthouse in Knoxville, on Monday, June 7, 1909, and canvass the returns and issue certificates of election to the defendants. An injunction was prayed and granted, restraining the election commissioners from canvassing the votes and from issuing certificates to the defendants, and also restraining the defendants from entering upon

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the discharge of their duties as mayor and aldermen. Stated briefly, this is a bill filed by the old board of mayor and aldermen, seeking to hold over and prevent the new board from assuming office and discharging the duties thereof, on the ground that the election was void by reason of frauds committed in the progress thereof, which made the result incurably uncertain.

Several grounds of demurrer were filed, but we need only state the first, which is that the chancery court has no jurisdiction of the controversy. The chancellor sustained this ground of demurrer, and dismissed the bill. Thereupon the complainants prosecuted an appeal to this court, and have here assigned errors.

The decree of the chancellor was correct, and must be affirmed. The chancery court has no power to enjoin election officers from issuing a certificate of election, or restraining public officers from assuming their functions, even though it be alleged that there was fraud in the election sufficient to vitiate it. 22 Cyc., 1886; 10 Am. and Eng. Enc. of Law, 817, 818; High on Injunctions, sections 1312, 1316.

It is insisted in the brief of complainants' counsel that a distinction must be taken between the jurisdiction of the court and the propriety of applying a particular remedy. This is true; but the suggestion is not apt in the present case, because the very life of the bill before us is the injunction sought, by means of which the complainants seek to retain possession of the offices, after their time has expired, and prevent the defend-

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ants, who have a *prima facie* title, from assuming the duties of the office.

Aside, however, from the question of the remedy, we are of the opinion that the chancery court has no jurisdiction of the controversy. The facts stated make the case one of contested election pure and simple. No tribunal being in terms designated by statute for the trial of such cases as a contest over the offices of mayor and aldermen, and no tribunal being provided for the induction of these officers, it follows that the jurisdiction devolves upon the circuit court, under the section of the Code which provides in substance, that the court has jurisdiction in any case left unprovided for. It was so held in *Baker v. Mitchell*, 105 Tenn., 610, 59 S. W., 137. See, also, *Conner v. Conner*, 8 Baxt., 11.

It is insisted in behalf of complainants that there can be no contest, except between persons who are candidates for the office. This is a mistaken view. It was held in *Marshall v. Kerns*, 2 Swan, 68, that the incumbent might object to the induction of the person holding the certificate of election, and contest the matter with him on the ground that the election was void, although such incumbent had not been a candidate for election. It was held in *McCraw v. Harralson*, 4 Cold., 34, that such a contest might be raised, indeed, by the court itself, upon which was devolved the duty of inducting the officer; in *Lewis v. Watkins*, 3 Lea, 174, 181, 182, that one who had been an opposing candidate, although he received less votes than his opponent, might main-

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tain a contest with him, on the ground that the latter was disqualified to hold office, and hence insist that the election was void. It was held, in *Maloney v. Collier*, 112 Tenn., 78, 91-94, 83 S. W., 667, that it is settled law in this State that the validity of an election may be determined in a contested election case. The authorities above referred to, and others, are cited and discussed in that case. Our authorities do not warrant any such distinction as is attempted in the brief of complainants' counsel, to the effect that there must be opposing candidates involved in the litigation before there can be a contest, and that where there are not such opposing candidates the jurisdiction exists in the chancery court to declare the election void on the ground of fraud. Our authorities distinctly hold that, where the questions raised by the litigation necessitate going behind the returns, the case presented is an election contest, whether the judgment to be rendered under the pleadings be that one or the other of two contesting parties has been elected, or that there has been no legal election at all. Authorities *supra*, and *State, ex rel., v. Gossett*, 9 Lea, 644.

We are referred by counsel to certain cases as justifying the bill, viz.: *Pucket v. Bean*, 11 Heisk., 600, and *Lawrence v. Ingersoll*, 88 Tenn., 52, 12 S. W., 422, 6 L. R. A., 308, 17 Am. St. Rep., 870 (*mandamus* cases); *Morris v. City of Nashville*, 6 Lea, 337 (a case involving the annexation of a new territory to a city); *Winston v. Railroad Co.*, 1 Baxt., 69, and *Catlett v. Railroad*, 120

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Tenn., 702, 112 S. W., 559 (cases involving county subscriptions to railroads); and *Lindsay v. Allen*, 112 Tenn., 659, 82 S. W., 171 (involving the removal of a county seat). In *Lindsay v. Allen* the jurisdiction of the chancery court was objected to on the ground that it was a matter involving a contested election. The court said, upon that subject, that the case fell within the principle of *Winston v. Tennessee & Pacific R. R. Co.*, supra; that the occasion of the interference of the court in that case was to declare void the subscription of a county to a railroad enterprise, because a constitutional prerequisite, the consent of the people by the required majority, had not been obtained, while in the case then before the court the jurisdiction was invoked on the same ground to prevent the removal of a county seat; that the underlying principle was the same in such case, although the special occasion that called it into being was different; that such controversies do not fall under the classification of contested election cases, but, on the contrary, under the class of cases wherein the court restrains public officers from the exercise of unconstitutional powers. 112 Tenn., 659, 660, 661, 82 S. W., 171.

It is also said in *Winston v. Railroad Co.*, that the means by which the will of the people is ascertained and their consent obtained to the making of a contract is merely by accommodation called an "election." This is also true as to cases in which it is sought to ascertain the same thing in respect of a proposition to remove a

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county seat. When a question is subsequently raised as to whether the people really consented to the proposed action, it is necessary that the court having jurisdiction of the matter should investigate the operation of the means adopted in order to learn whether the consent was truly obtained. The court of chancery is, of course, the proper tribunal to enjoin the acts of officers purporting to obey an alleged direction of the people, when it is charged that there was, in fact, no such direction, because of fraud practiced upon the people or the violation of some constitutional inhibition. The same is true, when the question arises as to whether the people have truly directed the removal of a county seat from one part of a county to another. As to *mandamus* cases, when it is sought to compel an officer to do some particular thing—that is, to recognize some other person as an officer, or to obey some mandate supposed to be the mandate of the people rendered in the form of an election—it necessarily results that the officer or person so sought to be coerced must have the right to question whether the person put forward as an officer to be received is in fact an officer, or whether the assumed direction is a real direction of the people.

Affirm the decree, with costs.

Express Co. v. Patterson.

SOUTHERN EXPRESS COMPANY v. T. E. PATTERSON *et al.*

(*Knorrville*, September Term, 1909.)

1. **TAXATION.** Void proceedings for back assessment may be perpetually enjoined by property owner.

If a proceeding pending before the county trustee for the back assessment or reassessment of the intangible property of a foreign corporation lawfully doing business in this State, with its domicile in another State, is void, because there is no statute fixing the *situs* of such property in this State, or because there is no statute providing for ascertaining the value and assessment of such property, for taxation in this State, such corporation may invoke the jurisdiction of the chancery court to have the same so declared, and perpetually enjoined. (*Post*, pp. 283-286.)

Case cited and approved: *Briscoe v. McMillan*, 117 Tenn., 126, 127.

2. **SAME.** Intangible property of a foreign express company having its *situs* here may be taxed under statute so providing.

The intangible property of a foreign corporation having its *situs* in this State may to that extent be assessed for taxation under a statute so providing. Express companies own intangible property consisting of franchises, privileges, etc., growing out of the unity of the use of its tangible property, which intangible property may be assessed for taxation, under statutes properly providing therefor, in the several States where the company does business, each State assessing only that part within its jurisdiction; and such assessment is generally made by considering the market value of the stock, bonded indebtedness, and tangible property of the corporation and its gross receipts and net earnings. (*Post*, pp. 286-292.)

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Cases cited and approved: *McLaughlin v. Chadwell*, 7 Heisk., 389; *Bedford v. Nashville*, 7 Heisk., 409; *Franklin Co. v. Railroad*, 12 Lea, 521; *Car Co. v. Pennsylvania*, 141 U. S., 18, 22; *Adams Express Co. v. Ohio State Auditor*, 165 U. S., 221; *Express Co. v. Indiana*, 165 U. S., 255; *Express Co. v. Kentucky*, 166 U. S., 171; *Refrigerator Co. v. Hall*, 174 U. S., 78; *New Orleans v. Stempel*, 175 U. S., 309; *Assessors v. D'Escompte*, 191 U. S., 400; *Fargo v. Hart*, 193 U. S., 490; *Insurance Co. v. New Orleans*, 205 U. S., 395.

Case cited and distinguished: *Grundy Co. v. Railroad*, 94 Tenn., 321.

3. **SAME.** Constitutional provision for taxation is not self-executing, and legislation is necessary to enforce it.

The constitutional provision requiring all property, with certain exceptions specified, and with certain exceptions that may be made by the legislature, to be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State and no species of property shall be taxed higher than any other species of property of the same value, is not self-executing, and the legislature must enact laws for its enforcement by legislation which not only includes the property and subjects it to taxation, but also provides a proper mode of valuation and assessment before it can be enforced. (*Post*, pp. 292-294.)

Acts cited and construed: Acts 1903, ch. 258, sec. 1.

Constitution cited and construed: Art. 2, sec. 28.

Cases cited and approved: *Railroad v. Williams*, 101 Tenn., 146; *Bank v. Memphis*, 101 Tenn., 158.

4. **SAME.** Same. Statute taxing the intangible property of foreign corporations, as express companies doing business in this and other States, must fix its situs and provide a method of assessing.

Where the only statutory provision made for the assessment of the intangible property of foreign corporations doing business

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in this State and other States, for taxation in this State, is a provision that foreign corporations having branch factories or businesses in this State shall only be assessed on the actual cash value of the corporate property, including therein the franchises and intangible values of the corporation in this State, the intangible property of a foreign express company doing business in this State and in other States cannot be assessed and taxed thereunder, because the statute does not fix the *situs* of the intangible property of such foreign corporations, or provide a method for valuing and assessing the same for taxation. (*Post*, pp. 294-302.)

Acts cited and construed: Acts 1903, ch. 258, secs. 1, 22, 23, 24.

5. **SAME.** "Principal office or place of business" of a corporation is its domicile which is defined.

The "principal office or place of business" of a corporation, especially in connection with the taxation of its property at such place, means its domicile, which is the place where its governing power resides and is exercised, and not the place where its ordinary business is conducted; and under our statutes, residence or domicile of a corporation is the county where its charter is registered in compliance with our statute providing for the creation of corporations, but this provision has no application to foreign corporations. (*Post*, pp. 283, 300, 301.)

Acts cited and construed: Acts 1903, ch. 258, sec. 24.

Case cited and approved: *Grundy Co. v. Railroad*, 94 Tenn., 308.

6. **SAME.** Legislative intention not to tax the intangible property of foreign express companies doing business in the State and other States evidenced by other legislation for taxation.

In view of the legislative policy of the State as to taxation of the intangible property of certain quasi public corporations, as evidenced by the fact that the property of railroad companies, telegraph companies, and telephone companies is assessed by the railroad commissioners, acting as assessors under Acts 1897, ch. 5, under which the proportionate part of the taxes

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collected is distributed to all the towns, cities, and counties in which the property is located, or business is done, it is evident that it was not the legislative intention, under Acts 1903, ch. 258, secs. 22, 23, and 24, to assess and tax the intangible property of such foreign corporations as express companies doing business in this State and other States. (*Post*, pp. 301, 302.)

Acts cited and construed: Acts 1897, ch. 5; Acts 1903, ch. 258, secs. 22, 23, and 24.

7. **SAME.** Intangible property of a foreign corporation is not taxable in one county only, but proportionately in all counties in which it exists.

The county trustee of one county would have no authority to assess the entire value of the intangible property of a foreign corporation, as an express company, doing business in the various counties of this State and in other States, if a method for ascertaining and assessing its value was provided by statute; but the portion in each and every county would be there assessable. (*Post*, pp. 301, 302.)

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—T. M. McCONNELL, Chancellor.

COLEMAN & FRIERSON, for complainant.

BROWN & SPURLOCK and CHAMBLISS & CHAMBLISS, for defendants.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

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The bill in this case was brought in the chancery court of Hamilton county by the Southern Express Company, a foreign corporation having its domicile in the city of Atlanta, Ga., against T. E. Patterson, who is sued as trustee of Hamilton county, and A. S. Birdsong, who is sued as revenue agent of the State of Tennessee, to enjoin a proceeding begun by A. S. Birdsong, as revenue agent, before T. E. Patterson, trustee to back-assess the intangible property of complainant situated in Tennessee, for the years 1903, 1904, 1905, and 1906. The case was heard by the chancellor upon bill and answer and the facts as agreed upon by the parties and the bill dismissed. The complainant has appealed to this court, and assigns errors.

The facts disclosed by the record are as follows:

Complainant is a corporation under the laws of the State of Georgia, having its principal office or place of business and domicile in that State, where it holds its regular meetings of stockholders in accordance with the laws of that State, and it is not authorized by its charter or by-laws to hold these meetings in any other State. It has complied with the laws of Tennessee prescribing the terms upon which foreign corporations may do business in this State.

It is an express company, carrying on and conducting its business in Georgia, Tennessee, and several other States of the Union, as a common carrier. It owns no transportation lines, cars, or engines, but does its business upon cars and over the lines of railroad companies

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for a consideration paid to them. Its business is to thus transport such packages, money, and other valuables and freights as may be intrusted to it for carriage, and has in Hamilton county and many other counties of this State, offices, agents, furniture, drays, and horses, used in the conduct and operation of this business. It also has in Hamilton county offices where its entire general auditing and accounting business is done. All of the tangible property of the company, real and personal, in Hamilton county, was there duly assessed for taxation for the several years involved, and the taxes paid. There is no complaint of the assessment of this property, and the proceeding attacked does not in any way involve it.

The notice served upon complainant, requiring it to appear before said Patterson, states the object of the proceeding to be "for the purpose of being assessed for the years 1903, 1904, 1905, and 1906, upon omitted or inadequately assessed property in said county and State, and to show cause, if any, why said property should not be back or reassessed at its actual cash value." When the complainant appeared in response to this notice, the object of the proceeding was more definitely stated by the counsel for A. S. Birdsong, revenue agent, in these words:

"This proceeding is based upon information that the intangible assets and franchises of the above defendant have been omitted from taxation, or not assessed, or inadequately assessed, in the above State and county,

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and there is no information in possession of said revenue agent to the effect that the tangible property of defendant is improperly assessed. Therefore the purpose of this proceeding is to limit the inquiry to intangible assets."

Counsel for revenue agent, for the purpose of ascertaining the intangible assets sought to be assessed and the value of the same, submitted to the officials of the complainant company interrogatories calling for a detailed statement of the capital stock of the company, its bonded indebtedness, the value of its stock and bonds, value of all of its tangible property, gross receipts in Tennessee and other States, dividends paid, and other facts tending to disclose its intangible property and its value.

The defendant, T. E. Patterson, ordered that these interrogatories be answered. Thereupon complainant filed this bill to enjoin the proceeding to reassess its property.

The contention of the complainant is that T. E. Patterson, as trustee of Hamilton county, has no authority or jurisdiction to assess its intangible property, and that said proceeding before him is absolutely void, because:

(1) Complainant is a foreign corporation having its domicile in the State of Georgia, and there is the *situs* of its intangible property, there being no statute of Tennessee fixing it in this State; therefore it is not within the jurisdiction of Tennessee, and cannot be here assessed and taxed.

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(2) That the general assembly of Tennessee has not by law provided for ascertaining the value and assessment for taxation, of the intangible property of foreign corporations doing business in Tennessee, and that, although said property may be subject to taxation in this State, until such provision is made by the legislature, it cannot be done.

If the proceeding pending before T. E. Patterson, trustee, is void for either of these reasons, complainant may invoke the jurisdiction of the chancery court to have the same so declared, and perpetually enjoined. *Briscoe v. McMillan*, 117 Tenn., 126, 127, 100 S. W., 111.

The general assessment law of Tennessee, under which the proceeding before T. E. Patterson was instituted, is to be found in chapter 258, p. 632, Acts 1903. We will hereafter state the sections of this act relied upon as authority for the assessment of complainant's property.

The property of the complainant sought to be assessed in the proceeding attacked is its intangible property, having its *situs* in Tennessee, growing out of the unity of use of its tangible property. There is no doubt of the existence of this character of property, and that it, like all other property in the State, is subject to taxation. In a number of States the legislatures have established boards for the valuation and assessment of it. It is no objection to its taxation that it is situated in more than one State, if the assessment be so made in

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the particular State as to exclude that having its *situs* in other States. It is generally arrived at by taking into consideration the market value of the stock, bonded indebtedness, and tangible property of the corporation, and its gross receipts and net earnings. It is well settled that express companies have such intangible property, and that it may be assessed in the several States where the company does business; each State assessing that only within its jurisdiction. Legislation enacted in several of the States for this purpose has been sustained by the courts of the States enacting it, and, on proceedings in error, by the supreme court of the United States. The nature of this intangible property and its *situs* will best be understood by referring to some of the decisions of those courts.

In *Adams Express Company v. Ohio State Auditor*, and other cases heard therewith, 165 U. S., 221, 17 Sup. Ct., 309, 41 L. Ed., 683, it is said:

"Doubtless there is a distinction between property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company do not constitute a physical unity, and their value as separate cars do not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway companies under contract, and the taxation of

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the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value may be reached by the State authorities on the basis indicated. No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture than that of railroad and telegraph companies and sleeping car companies to roadbed, rails and ties, poles and wires, or cars. That unit is a unit of the use and management, and the horses, wagons, safes, pouches, and furniture, the contract for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio possessed the value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

“We repeat that while the unit which exists may not be a physical unit, it is something more than a mere unit of ownership. It is a unit of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case, resulting from the very nature of the business. . . . The property of the express company, distributed through different States, is an essential condition of the business. United in a single specific use, it constitutes but a single plant,

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made so by the very character and necessities of the business."

These cases were before the court on a petition to rehear, and, after being again elaborately argued, the court, in adhering to the former decision, through Mr. Justice Brewer, said:

"But where is the *situs* of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. Where is the *situs* of this intangible property? It is simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise. Or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the \$16,000,000 that it possesses

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springs, not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this State contributes to that aggregate value, not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States; but, unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

“It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was, *‘Mobilia personam sequuntur.’* But that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman’s Palace Car Co. v. Pennsylvania*, 141 U. S., 18, 22, 11 Sup. Ct., 876, 35 L. Ed., 613, 616, 3 Interest. Com. R., 595.

“In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded

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to them in the markets of the world; and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."

Other cases to the same effect: *American Express Company v. State of Indiana*, 165 U. S., 255, 17 Sup. Ct., 991, 41 L. Ed., 707; *Adams Express Company v. Kentucky*, 166 U. S., 171, 17 Sup. Ct., 527, 41 L. Ed., 960; *Fargo v. Hart*, 193 U. S., 490, 24 Sup. Ct., 498, 48 L. Ed., 761; *American Refrigerator Company v. Hall*, 174 U. S., 78, 19 Sup. Ct., 599, 43 L. Ed., 899; *State Board of Assessors v. Comptoir Nationale d'Escompte*, 191 U. S., 400, 24 Sup. Ct., 109, 48 L. Ed., 232; *City of New Orleans v. Stempel*, 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174; *Metropolitan Life Ins. Company v. New Orleans*, 205 U. S., 395, 27 Sup. Ct., 499, 51 L. Ed., 853.

The case of *Grundy County v. T. C., I & R. R. Co.*, 94 Tenn., 321, 29 S. W., 116, is not in conflict with the above cases in relation to the *situs* of property. While it was there held that the *situs* of intangible assets and other personal property was at the domicile of the corporation, yet it was because the statutes then in force fixed this domicile or directed it to be assessed elsewhere. On the contrary, it is well settled in this State that the *situs* of personal property, inclusive of intangi-

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ble assets, for the purpose of taxation, is within control of the legislature, and may be fixed by it. *McLaughlin v. Chadwell*, 7 Heisk., 389; *Bedford v. Nashville*, 7 Heisk., 409; *Franklin County v. R. R. Co.*, 12 Lea, 521.

Thus it is well established that corporations of the character of the complainant have intangible values, which are property in a commercial sense and subject to taxation along with other property, real, personal, and mixed, and that, where the corporation carries on and conducts its business in another State than that under the laws of which it has its domicile, the *situs* of that particular part of these intangible values which is created and grows out of the business, the good will, of the company in such State, is there, and subject to assessment and taxation under the laws of that State.

The constitution of Tennessee (article 2, section 28) ordains that "all property, real, personal or mixed, shall be taxed," with authority in the general assembly to except that held by the State, counties, cities, and towns for the public purposes, and that used solely for religious, charitable, scientific, literary, or educational purposes, and "except one thousand dollars worth of personal property in the hands of each taxpayer, and the direct products of the soil in the hands of the producer and his immediate vendee." This section further provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one

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species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

This provision, however, is not self-executing, and the legislature must enact laws for its enforcement.

The first section of chapter 258, p. 632, Acts 1903, under which the proceeding before T. E. Patterson was instituted, enacts "that all property, real, personal and mixed, shall be assessed for taxation for State, county and municipal purposes, except such as is declared exempt in the next section."

This includes the intangible property of all corporations, and subjects it to taxation; but this is not sufficient. The requirement that the legislature provide a mode for the ascertainment of the value of property—the assessment of it—so that it may be assessed according to its value, and that the taxes collected from it be equal and uniform with those assessed upon other property of the same value, is equally mandatory, and before any property can be valued and assessed for taxation a proper method and machinery for such valuation and assessment must be provided. *Bank v. Memphis*, 101 Tenn., 158, 46 S. W., 557; *Railroad Co. v. Williams*, 101 Tenn., 146, 46 S. W., 448.

The defendant, T. E. Patterson, claims that chapter 258, sections 22, 23, 24, Acts 1903, provide for the valuation and assessment of the intangible property of complainant, for taxation, and that he is, as trustee of Hamilton county, authorized to make the assessment.

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If this contention is not well made, then there is no law providing for the assessment of this property, and the defendant has no authority to assess it for taxation.

We are of the opinion that this statute does not provide a method for the assessment of the intangible assets of the complainant.

Section 22 is in these words:

"Sec. 22. That every quasi public corporation doing business and being operated in this State, such as gas works, water works, electric light, street railroad and dummy railroad companies, and all other corporations public in their character, and which possess rights, franchises, privileges, shall pay an ad valorem tax upon the actual cash value of its corporate property, including its franchises, easements, incorporeal rights, and privileges, and all other corporate property, which said value shall not be assessed at less than the aggregate actual cash value of both its shares of stock and bonded debt, and which said value shall be computed by looking to and considering the market value, and if no market value, the actual value of such stocks and bonds to the corporation; provided, however, that the assessment and taxation of said corporate property or capital stock shall be in lieu of any assessment or taxation of the shares of stock or bonds, either to the corporation or the owners thereof; and, provided, also, that the assessed value of the corporate realty and tangible personalty otherwise assessed shall be deducted in making the assessment from the value of the corporate property or

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capital stock. Real estate and tangible personalty of any corporation defined in this section shall be assessed in the same mode and manner, and where situate, as other real estate and tangible personalty. In computing the value of and assessing corporate property or capital stock under this section, the assessed value of real estate and tangible personalty shall be deducted from the aggregate actual cash value of the corporate property or capital stock, and the remainder shall constitute the value upon which the assessment shall be based. The value of the capital stock or corporate property, as used in this section, shall be construed as including all tangible and intangible and franchise values. All corporations, foreign or domestic, other than those hereinbefore designated in this section and in the proviso to this clause, shall be assessed in the same mode and manner as quasi public corporations, set out in this section; provided, however, this section shall not be construed as including railroad, telegraph, telephone, building and loan, insurance, manufacturing, banking companies or corporations, as are set out in sections 23 and 25 of this act, the assessment of such companies or corporations being otherwise provided for in this and in said sections.

“For the purpose of assessing quasi public and other corporate property defined in this section, the president, or chief officer in charge of and operating the business, shall fill out and furnish to the assessor, under oath and in writing, an assessment schedule (to be returned by

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the assessor to the county court clerk for preservation), which schedule shall contain the following questions, viz.:

“(1) The amount of stock authorized, the number of shares into which such stock is divided, and the amount of stock paid up, and the number of shares issued.

“(2) The market value, and if no market value, the actual value of such shares of stock, and what the same can be sold for on the market.

“(3) The amount of the outstanding, bonded debt, if any, the rate of interest borne by the same, and whether the interest is paid or in default.

“(4) The market value, if any, and if no market value, the actual value of such bonded debt.

“(5) What dividends have been paid on stock in the last two years, and what surplus, if any, on hand.

“(6) An itemized statement of all the tangible personal property in each county, district, or ward, where the same is situate, and the assessed value of each item, and an itemized statement of all real property, where the same is situate, and the assessed value of each item, and a certified copy, as set out in section 24 of this act.

“(7) An itemized statement of all stocks and bonds, securities, notes, accounts, and choses in action owned or held, whether the same be unincumbered or transferred or deposited, or used as collateral, wherever the same may be situate, and also all moneys on hand, or on deposit, wherever the same may be situated.

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“(8) Such other facts pertaining to the value of the property as may be demanded or deemed necessary or material by the assessor. The assessor shall, in the premises have full power and authority to examine witnesses; to inspect or require the production of books or papers; to obtain and consider any evidence other than that contained in said statement that he may deem material or necessary. The assessor shall visit and inspect the property whenever practicable, inform himself as to the value of same, obtain all necessary or material evidence of the value of the property, and of the shares of stock, and of the bonded debt, either from the statement required in this act or from such other sources as he may deem proper or necessary.”

This section applies exclusively to corporations, domestic and foreign, conducting their entire business in one county of this State. This appears almost in express terms, and is clearly implied. It is obvious that the clauses providing that all the property of corporations of every kind and description, tangible and intangible, shall be valued and assessed, necessarily exclude corporations doing business and operating in other States, because the tangible and intangible property belonging to them in such other States is beyond the jurisdiction of the State of Tennessee, and cannot be taxed by it.

This is also the intention of section 23, which is confined to the assessment of the property of manufacturing corporations, and contains practically the same provisions for the assessment of all the tangible and intangible property of that class of corporations.

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What is conclusive, however, that these two sections, 22 and 23, do not apply to corporations doing business or having property in other States of an intangible character, is that section 24 expressly undertakes to provide for the assessment of the property of those corporations. The first paragraph of this section is in these words, viz.:

"Sec. 24. That when any corporation, foreign or domestic, defined in sections 22 and 23 of this act, owns property in this and another State, or in more than one county in this State, or in more than one civil district in any county, the capital stock or corporate property of the corporation shall, except as hereinbefore provided in this section as to foreign corporations, be assessed in the county, or place, or civil district, fixed in its charter for the meeting of its stockholders, and in case such place of meeting is not fixed in its charter, then in the county, or place, or civil district where the principal office or place of business of the corporation is located, which said assessment shall be made in the following manner, viz.:

"The assessor shall compute the value of the capital stock or corporate property at not less than its aggregate actual cash value, and deduct therefrom the assessed value of all real estate and tangible personal property, as hereinbefore set out, wherever the same may be situate, and the remainder shall constitute the assessable value of the corporate property or capital stock at the place of assessment. Tangible personal property and realty of such corporation shall be as-

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sessed at the place or in the district where the same is situate at the time of the assessment, and by the proper authority at that place designated by the law. The assessed value of such real and tangible personalty shall be verified by a properly certified copy from the assessment rolls or lists which said certified copy shall accompany the statement hereinbefore required, and be likewise returned by the assessor to the county court clerk for preservation."

This paragraph provides for the assessment of the property of domestic corporations having property in more than one State, county, or civil district in this State, and fixes the *situs* of such property and the place for its assessment in the civil district and county fixed in the charter of the corporation for the meeting of its stockholders, and in the absence of the place being so fixed, then in the place, civil district, or county where the "principal office or place of business of the corporation is located."

Foreign corporations are here expressly excluded, and are provided for in a subsequent paragraph, which is in these words, viz.:

"Foreign corporations mentioned in sections 22 and 23, having branch factories or business in this State, shall only be assessed on the actual cash value of the corporate property in this State; provided, however, the franchise and intangible values of the corporation in this State shall be included in the valuation of the corporate property in the State."

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This paragraph is the only one which relates to the assessment of the intangible assets of foreign corporations doing business in this and other States, and it contains no provision fixing the *situs* of the intangible assets of such corporations, or a method for ascertaining their value and assessing them for taxation, and thus fails to accomplish its purpose.

The contention of the defendant that the *situs* of the intangible property of complainant is in Hamilton county and that he has authority to assess it is predicated upon the provisions of the first paragraph of section 24, to the effect that corporations, having property, in more than one county or State, of this character, shall be assessed in the county fixed in the charter for the meeting of the stockholders, and, if no county be so fixed, then in that where the principal office or place of business of the corporation is located.

It is conceded that complainant's charter does not fix Hamilton county as the place for the meeting of its stockholders; but it is insisted that its principal office or place of business in this State is in that county, because it there has its auditing department, and all other counties it has only its usual offices for conducting its business of transportation. If this paragraph applied to foreign corporations, this contention would be unsound. The term "principal office or place of business" means, especially in connection with taxation, the domicile of the corporation. *Grundy County v. T. C. I. Railroad Co.*, 94 Tenn., 308, 29 S. W., 116.

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The residence or domicile of a corporation under our statute is the county where the charter is registered in compliance with our statutes providing for the creation of corporations; and it is the place where the governing power of the corporation resides and is exercised, and not the place where its ordinary business is conducted. *Desty on Taxation*, vol. 1, p. 341.

But, as we have seen, this provision has no application to foreign corporations.

The legislature having failed to fix the *situs* of the intangible property of foreign corporations growing out of business done and property owned by them in more than one county in this State, it is to be found in all of the counties where this property and business is located and carried on. The trustee of Hamilton county would have no authority to assess the entire value of the intangible property of the complainant in that county, if a method for ascertaining and assessing its value was provided by the statute; but the portion in each and every county would there be assessable. But, in the absence of a method provided for ascertaining its value, it cannot be assessed anywhere. The remedy is not in the courts, but with the legislature.

We are also of the opinion that, so far as complainant is concerned, it was not the intention of the legislature to provide in sections 22, 23, and 24 of chapter 258 of the Acts of 1903 for the assessment of its intangible property. The policy of the State has been to assess this character of property of corporations of this

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class in an entirely different manner and by different officers. The property of railroad companies, telegraph companies, and telephone companies is assessed by the railroad commissioners, acting as assessors under chapter 5, p. 102, of the Acts of 1897, which provides a method for assessment whereby the tax collected is distributed so as to allow all the towns, cities, and counties in which the property is located their proportionate portion. We cannot see any reason why, in the assessment and taxation of the property of express companies, discrimination should be made, against them, or the several municipalities and counties in which they do business, and it is evident that it was not the intention of the legislature that it should be done.

We are therefore of the opinion, and hold, that the defendant, T. E. Patterson, as trustee of Hamilton county, has no power to assess the intangible property of complainant for taxation in that county, and that the proceeding which was being conducted before him for that purpose was unauthorized and should be perpetually enjoined.

Therefore the decree of the chancellor dismissing complainant's bill will be reversed, and a decree here entered in accordance with this opinion.

Taylor v. Swafford.

MRS. E. J. TAYLOR, by next friend, v. G. W. SWAFFORD
et al.

(*Knoxville*. September Term, 1909.)

1. **EXPECTANCIES IN INHERITANCE.** Sale by heir expectant and *sui juris*, will be sustained, if fair.

A contract of sale of an expectancy in inheritance by an heir expectant and *sui juris*, while jealously viewed and closely scrutinized, yet, if fair and honest, will be sustained by a court of equity. (*Post*, p. 307.)

Cases cited and approved: Fitzgerald v. Vestal, 4 Sneed, 258; Steele v. Frierson, 85 Tenn., 430; Read v. Mosby, 87 Tenn., 759.

2. **SAME.** Same. Sale by heir expectant and *sui juris* will be sustained as a covenant to convey, when property comes into possession.

A contract of sale of an expectancy in inheritance by an heir expectant and *sui juris*, if fairly made and based on a valuable consideration, will be enforced as against the grantor and his privies, whenever the property comes into his possession, upon the theory that the conveyance is treated and operates as an agreement or covenant to convey. (*Post*, pp. 308-311.)

Cases cited and approved: Chew v. Barnet, 11 Serg. & R. (Pa.), 389; Bayler v. Commonwealth, 40 Pa., 37; Railroad v. Woelpper, 64 Pa., 366; McDonald v. McDonald, 58 N. C., 214; Page v. Gardner, 20 Mo., 507; Seymour v. Railroad, 25 Barb. (N. Y.), 285; Squib v. Wyn, 1 P. Wms., 381; Trevor Case, 2 P. Wms., 191; Wright v. Wright, 1 Ves., 412.

3. **MARRIED WOMEN.** Their deeds were void at common law, and the validity thereof depends upon statute.

The deed of a married woman conveying her land was absolutely void at the common law, and she was also incapable, under

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said law, of binding herself by contract; and, therefore, her power to contract for the sale of her real estate depends upon statutory authority, which must be strictly followed. (*Post*, pp. 310-312.)

Cases cited and approved: *Cope v. Meeks*, 3 Head, 387; *Gillespie v. Worford*, 2 Cold., 632.

4. EXPECTANCIES IN INHERITANCE. Conveyance by married woman is void for want of statutory power.

A deed of trust executed by a married woman, though joined in by her husband, attempting to convey her expectancy as an heir in the estate of her father while living, or her possibility of inheritance in his estate, is void for want of statutory authority. (*Post*, pp. 305, 306, 312.)

5. SAME. Same. Married woman is not estopped by warranty of title in her deed void for want of power.

Where a married woman's deed conveying her expectancy as an heir in the estate of her father was void for want of power to make it, she will not be estopped to claim the property subsequently descending to her from her father by reason of the warranty of title contained in such deed. (*Post*, pp. 312, 313.)

Cases cited and distinguished: *Gore v. Howard*, 94 Tenn., 577; *Bruce v. Goodbar*, 104 Tenn., 638.

6. SAME. Same. Same. Married woman is not estopped to assert invalidity of her deed void for want of power by short delay not prejudicial to parties.

Where a married woman was induced to sign and acknowledge a deed of trust conveying her expectancy as heir in her father's estate to secure debts of her husband, in the making of which debts she had no part, and from which she received no benefit, by being fraudulently told or impressed by her husband and son that the instrument conveyed the husband's property only, and no money was ever paid to her, and she did nothing to mislead the holders of the deed to their prejudice, she was not

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estopped, by her failure to protest against the fraud immediately on discovering it, nor by her inaction before seeking relief against the deed, to assert its invalidity. (*Post*, pp. 313, 314.)

7. **SAME.** Married woman's deed of trust set aside as void without requiring reimbursement of moneys advanced to or for her husband, when.

Where a married woman's deed of trust, attempting to convey her expectancy as heir in the estate of her father as security for her husband's debts, is set aside because it was absolutely void, *ab initio*, she will not be required to reimburse a beneficiary thereunder for moneys paid by him to her husband or at his instance and request when the deed was executed and delivered, or within a reasonable time thereafter. (*Post*, pp. 314, 315.)

FROM BLEDSOE.

Appeal from the Chancery Court of Bledsoe County.
T. M. McCONNELL, Chancellor.

PRITCHARD & SIZER, for complainant.

BURKETT, MILLER & MOORE and LOUIS S. POPE, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

On the 15th of March, 1902, the complainant, then and at the time of the filing of her bill in this cause the

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wife of one of the defendants, joined her husband in the execution of a trust deed, conveying for the security of debts of her husband, in the contraction of which she took no part, and from which, so far as we can discover, she derived no benefit, her expectancy as an heir of, or possibility of inheritance from, her father, who was then alive. A large part of the debts thus sought to be secured were created prior to the making of the trust deed. As compared with the whole, only a small part of the consideration passed, at the time of its execution, or in reliance upon it as security.

The record shows that the father had no knowledge of the existence of this deed; it being kept from the records until after his death. Upon the death of the father, without a will, the trust deed was foreclosed, and the share of the complainant, as distributee and as heir in her father's estate, was purchased by one of the beneficiaries, as trustee, for all the beneficiaries named therein. Subsequently the interest of the complainant in her father's personal estate was paid by the administrator to the defendant Miller, and her share of the real estate was sold in several parcels to the defendants Swafford and Taylor.

The present bill is filed by the complainant, to have declared void and inoperative, so far as she is concerned, the trust deed of March 15, 1902, to have removed as clouds upon her title the claims of Swafford and Taylor, and for a decree against the administrator and Mil-

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ler for the money paid by the former to the latter out of her distributive share in her deceased father's estate.

Upon the record, two questions are presented: First, was this trust deed, executed as it was with due statutory formality, sufficient to carry into the trustee the expectancy, or possibility, of complainant as distributee and heir of her father's estate? And, second, if not, then, when the father died, did this after-acquired estate inure to the trustee under the rule of estoppel, the trust deed containing a warranty of title in which the *feme covert* joined?

Beginning with *Fitzgerald v. Vestal*, 4 Sneed, 258, and extending down through the successive cases of *Steele v. Frierson*, 85 Tenn., 430, 3 S. W., 649, and *Read v. Mosby*, 87 Tenn., 759, 11 S. W., 940, 5 L. R. A., 122, the rule is announced that a contract of sale by an expectant heir, while looked upon with jealousy and closely scrutinized, yet, if fair and honest, will be sustained by a court of equity. These cases, however, involved the contracts of expectants, who at the time of making them were *sui juris*, while here we are dealing with one who, at the time of joining in the trust deed in question, was laboring under the disability of coverture.

It is an old and well-settled rule of the common law that, in order to constitute a valid contract of sale, there must be a grantor and grantee, and a thing in existence at the time of the contract; hence, under this rule, a mere possibility could not be conveyed. *Mc-*

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Crackin v. Wright, 14 Johns. (N. Y.), 193; *Davis v. Hayden*, 9 Mass., 514; *Bayler v. Commonwealth*, 40 Pa., 37, 80 Am. Dec., 551; 2 Leading Cases in Equity (White & Tudor's Ed.), pt. 1, p. 1605.

It is true that recitals and covenants might be of such a character as to conclude parties and privies and estop them from denying the full operation of the instrument, and so in many cases, even in courts of law, such recitals and covenants were held sufficient upon the principle of estoppel to pass to the grantee an interest in the property conveyed subsequently acquired by the grantor.

But, independent of the rule of estoppel, both in English and American courts of equity, where it is found that the contract of an expectant has been fairly made and upon a valuable consideration, it will be enforced, as against the grantor and his privies, whenever the property covered by it comes into possession. This is done, however, by these courts, not upon the ground that the grant is one of a present interest, but rather upon that stated by Gibson, C. J., in *Chew v. Barnet*, 11 Serg. & R. (Pa.), 389, to wit: "That a conveyance, before the grantor has acquired the title, operates as an agreement to convey, which may be enforced in chancery between the parties and against purchasers with notice."

This seems to be the theory upon which these courts have acted with regard to such contracts. "Such an assignment," said Lord Chancellor Hardwicke, in

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Squib v. Wyn, 1 P. Wms., 381, "always operates by way of agreement or contract, amounting in the consideration of the court to this: That one agrees with another to transfer or make good that right or interest (*Wright v. Wright*, 1 Ves., 412); and like any other agreement will cause it to be specifically performed . . . when the assignor is in a condition to transfer the property, or to cause it to be transferred, to his assignee."

In *Bayler v. Commonwealth*, supra, it is said: "When the deed does not undertake to convey any existing estate, when the subject of the grant is only an expectancy, it is difficult to conceive of it as anything more than a covenant for a future conveyance." And in *McDonald v. McDonald*, 58 N. C., 214, 75 Am. Dec., 434, the supreme court of that State, speaking through that eminent jurist, Judge Battle, says that it is well sustained by authority that "chancery will give effect to a conveyance of a mere expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance when the assignor has acquired the power to perform it." To this proposition many authorities are cited in the opinion.

In Benjamin on Sales, 96, the distinction between a contract with regard to a thing in existence and that which has no existence is clearly stated. While things having a potential existence may be the subject of a sale, yet, said this author, "one can only make a valid agreement to sell, not an actual sale, where the subject of the contract is something to be afterwards acquired,

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as the wool of any sheep, or the milk of any cow, or any goods to which he may obtain title within the next six months."

In the *Trevor Case*, 2 P. Wms., 191, a contract in consideration of marriage to settle all such lands as might come by descent, or otherwise, from the obligor's father, was enforced, after the death of the father, by the chancellor, as an agreement resting on a valuable consideration.

As supporting the proposition that such a contract is treated in equity simply as a covenant to convey, see *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa., 366, 3 Am. Rep., 596; *Page v. Gardner*, 20 Mo., 507; *Seymour v. Railway Co.*, 25 Barb. (N. Y.), 285.

It is true that Mr. Pomeroy, in his work on Equity Jurisprudence (volume 3, sec. 1288), expresses dissatisfaction with the view of such a conveyance announced by these high authorities, as to the ground upon which equity takes jurisdiction of, and enforces, performance of a conveyance of an expectancy when it falls in, but rather is disposed to regard the contract "as an equitable assignment of a present possibility, which changes into an assignment of the equitable ownership as soon as the property is acquired by the vendor, or mortgagor;" the rights of these latter to be enforced in a court of equity.

But, if it be that the rationale of the rule is that which has behind it the opinion of such great judges as Lord Chancellors Hardwicke and Westbury, and the opin-

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ions of many courts in England and America of the highest authority, that a grant by an expectant is simply a "covenant to convey," or the view of Mr. Pomeroy be accepted, that "it is an equitable assignment of a present possibility," can the deed of trust involved in this controversy be interposed as a barrier by these defendants, when the complainant calls upon a court of equity in this State to protect her from the consequences of its execution? We are satisfied, under our cases, that if the trustee, or the beneficiaries, were here asking an enforcement of this trust deed, unless protected by the doctrine of estoppel, they would be repelled.

It is a matter of common learning that the deed of a married woman was absolutely void at common law. The only way open to her by which she could convey her title to land was by joining her husband in a fine. But it was equally the general rule of that law that a *feme covert* was incapable of binding herself by contract. This rule has been so often recognized and applied in our courts that it needs no citation of authorities in its support. Whatever power of contract a *feme covert* has, save in the matter of her separate estate, or in the transfer of her choses in action, or in transfers of a somewhat like nature, is purely statutory. Wherever an effort is made to bind her, or her property, with the exceptions just mentioned, the party seeking to do this must find his remedy in a statute. In dealing with her real estate, the rule is inflexible that the statute

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giving authority for such dealing must be strictly followed. She cannot convey unless her husband joins in the deed (*Cope v. Meeks*, 3 Head, 387); nor by an attorney in fact (*Gillespie v. Worford*, 2 Cold., 632), nor obligate herself by bond to convey title.

In view of these holdings, certainly, if this instrument be as the great weight of authority indicates, and as we deem it, merely a covenant to convey, or even if Mr. Pomeroy's view is adopted, then, in either event, lacking statutory power to make such a contract, this trust deed was inoperative against the complainant, and affords no protection to the defendants, unless they can invoke the rule of estoppel. This it is insisted they may do by reason of the warranty of title which the instrument contains.

While it is true that there are cases referred to in *Bruce v. Goodbar*, 104 Tenn., 638, 58 S. W., 282, which hold that a *feme covert*, equally with one *sui juris*, is estopped to set up an after-acquired title against a grantee holding under a warranty deed, this is not so in a case like the present, where the instrument in question is invalid for lack of power to make it. For it is a general rule that a married woman is not estopped by her unauthorized or invalid deed, since she cannot be estopped by any conveyance she had no power to make. 21 Cyc., 1343, and cases cited. Even where a deed is perfect in form, yet is not executed in the mode provided by statute, the warranty does not work an estoppel as to the married woman. 11 Am. and Eng. Ency. of Law (2d Ed.), 393, and cases cited.

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The case of *Gore v. Howard*, 94 Tenn., 577, 30 S. W., 730, is not in conflict with this view. There certain children of the testator in his lifetime for a valuable consideration released to him all interest they had in his estate. At his death they sought to contest his will, and they were repelled in the lower court. On appeal this court, speaking through McAlister, J., said, in answer to the argument that, though such assignments would be protected in courts of equity, that at law they were absolutely void: "While the proposition is true as applied to the enforcement of such assignments for the recovery of specific property, it is also true that an estoppel may arise out of such transactions which may be successfully interposed in a court of law. It appears from the record that the defendant's distributees executed those releases, and as a consideration for executing them accepted large sums of money from their ancestor, the testator. . . . The defendants still hold onto the fruits of the transaction, and yet seek to disaffirm the contract. . . . The testator was undoubtedly misled by these petitioners to his prejudice, being induced by their promise and agreement to part with large sums, which they appropriated and have enjoyed. We think that under these circumstances they are now estopped from contesting this will."

We find no such circumstances in this record to raise the rule of estoppel as against the complainant. She had nothing whatever to do with the making of the debts secured, nor was she consulted with regard to the mak-

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ing of the trust deed. It was prepared by one of the beneficiaries, and transmitted by mail to her husband at the family home. There it was presented to her, and, while some discrepancies are found in the testimony of the husband and of the son with regard to what was said to her at the time of its execution, as well as to other matters, yet we are satisfied that when she signed and acknowledged this trust deed it was under the impression, fraudulently made by her husband and son, that it was an instrument that conveyed alone the property of her husband for the security of the debts. No money was paid to her, and, so far as we can see, nothing that she has done has misled the parties to their prejudice. It is true she did not protest against the fraud practiced after having discovered it a short time before her father's death, nor did she, so far as we can see, appeal to him or resort to the court for relief during his life; but we are unable to discover in what respect the beneficiaries in this instrument were injured by her silence and her inaction. Beginning a few months after her father's death, she made one after another abortive effort in an appeal to a court of equity to relieve her; but, for reasons unexplained in this record, her various suits were dismissed without a trial of the issues, but without prejudice to her claims. Finally, through the present bill she did succeed in obtaining a foothold, and was decreed by the chancellor what she sought, and his decree granting such relief is in all things affirmed. The decree is reversed only in so far

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as it adjudges that the defendant Miller is entitled as against complainant to be reimbursed all sums paid by him in cash to defendant W. G. Taylor on the day of the execution of the deed in trust in question, and also moneys paid by him on that day, or within a reasonable time thereafter, at the instance and request of the husband, W. G. Taylor, and so much of the order of reference as required the clerk and master to report as to the sums of money so paid; this court holding complainant is in no way obligated to reimburse the defendant Miller for any moneys paid by him to, or at the instance of, complainant's husband.

The case is remanded for the taking of the account in other respects ordered by the chancellor.

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ALEXANDER FINLEY v. JAMES Y. BROWN *et al.*¹

(*Knorrville*. September Term, 1909.)

1. **ADOPTION OF CHILDREN.** In one State entitles them to inherit land in another State having similar adoption laws, when.

Where a child in a foreign State, in which both it and its adoptive father are domiciled, has acquired under the laws of that State the *status* of a child by adoption, such child must, under the comity of States, receive recognition of its *status* as child in every other State having substantially similar adoption laws, and must be held capable of succeeding to real property in accordance with the laws of the State where the property lies, if adopted children are capable of inheriting under such laws. (*Post*, pp. 327-330, 335.)

Cases cited and approved: *Woodward v. Woodward*, 87 Tenn., 644; *Trust Co. v. Blessing*, 103 Tenn., 237; *Ross v. Ross*, 129 Mass., 246; *Gray v. Holmes*, 57 Kan., 217; *Van Matre v. Sankey*, 148 Ill., 536; *Melvin v. Martin*, 18 R. I., 650; *McColpin v. McColpin* (Tex. Civ. App.), 77 S. W., 238; *Woodward's Appeal*, 81 Conn., 167, 168; *Shick v. Howe*, 137 Iowa, 249.

2. **SAME.** Same. Qualification of foregoing rule; provisions of the adoption statute of either State not to be extended to correspond to the other.

Where the recognition of the *status* acquired by a foreign adoption is confined to the provisions of the local law of the State so recognizing the foreign adoption, or the statute of a foreign State is not permitted to extend any further than the local statute upon the same subject, and where the rights which may

¹For conflict of laws as to adoption, see note to *Irving v. Ford* (Mass.), 65 L. R. A., 186.

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be acquired under the local adoption statute are broader than those acquired under the adoption statute of a foreign State, in which the adoption was effected, the rights acquired under the foreign adoption will not be enlarged, so as to be commensurate with those granted by the adoption statute of the State so acting by comity, such recognition of the *status* acquired by a foreign adoption, when so confined and limited, cannot be held to be a breach of the policy of that State in which the land lies, where such State has a law of adoption; nor can it be held to be a violation of the statutes of descent. (*Post*, pp. 330-332, 335.)

Cases cited and approved: *Keegan v. Geraghty*, 101 Ill., 26, 41; *Sunderland's Estate*, 60 Iowa, 732.

8. SAME. Same. Same. Our statutes of descent and adoption construed together give adopted child, though adopted in another State, the right of inheritance, when.

The provision in our statute of descent (Shannon's Code, sec. 4163) that an intestate's land shall descend equally to all his sons and daughters, and that if the intestate died "without issue," his land shall descend equally to his brothers and sisters, must be construed in connection with our statute of adoption (Shannon's Code, sec. 5411) providing that the adopted child shall have "all the privileges of a legitimate child to the applicant, with capacity to inherit and succeed to the real and personal estate of such applicant, as heir and next of kin," so that where a foreign adoption is recognized in this State by comity, the same relation is created; at least to the extent that such *status* is fixed by the foreign statutes, unless the powers purporting to be given thereby are greater than those conferred by our own statute. (*Post*, pp. 332, 333.)

Code cited and construed: Secs. 4163, 5411 (S.); secs. 3268-3270, 4390 (M. & V.); secs. 2420, 3645 (T. & S. and 1858).

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- 4 **SAME.** Same. Same. Same. Nonresident adopted child's right of inheritance is not impaired by nonaction until after bill is filed by other claimants, when.

The right of an adopted child of a nonresident intestate, where the adoption was made in another State, to inherit lands in this State was not impaired because the principle of comity was not invoked to obtain a recognition of the adopted child's *status* in this State until after the death of the adoptive parent, nor until after the intestate's brother had filed a bill to obtain possession of the property. (*Post*, pp. 333, 334.)

5. **SAME.** Same. Same. Same. Same. Foreign adopted child's right of inheritance is not impaired by his nonresidence, and the residence of the brother of the adoptive parent.

It is no objection to a foreign adopted child's right to inherit lands in this State from his intestate adoptive parent that the child was domiciled in the foreign State, in which he was adopted, at the time he invoked the principle of comity to sustain his right to inherit, nor because the *status* of the adoptive parent's brother as his heir in this State was immediately fixed on the date of the latter's death, since the adopted child's *status* took effect from the entry of the decree of adoption, and when recognized under the rule of comity, would be recognized as existing as of the date of its inception. (*Post*, pp. 333-335.)

6. **COMITY.** Laws of other States opposed to our policies will not be recognized by comity.

This State will not, by comity, recognize the laws of any other State opposed to her own institutions or policy. (*Post*, p. 335.)

7. **BASTARDS.** Legitimation by subsequent marriage of parents is recognized everywhere.

Where an illegitimate child has, by the subsequent marriage of its parents, become legitimated by virtue of the laws of the State or country where such marriage took place and the

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parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that *status*, including the right to inherit. (*Post*, pp. 335-338.)

Cases cited and approved: *Miller v. Miller*, 91 N. Y., 315; *Dayton v. Adkisson*, 45 N. J. Eq., 603; *Smith v. Kelly*, 23 Miss., 167; *Scott v. Key*, 11 La. Ann., 232.

Cases cited and disapproved: *Lingen v. Lingen*, 45 Ala., 410; *Williams v. Kimball*, 35 Fla., 49; *Smith v. Derr*, 34 Pa., 126; *Brown v. Finley*, 47 South., 577; *Birtwhistle v. Vardill*, 7 Clarke & Finnelly, 895.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County. T. M. McCONNELL, Chancellor.

WATKINS & THOMPSON, for complainant.

COLEMAN & FRIERSON, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in the present case was filed, asserting complainant's title as brother and only heir at law of James K. P. Finley, deceased, to certain real estate in the city of Chattanooga, this State. The principal defendant was James Finley, Jr., claiming the same property as the adopted son of James K. P. Finley. A demurrer was filed to the bill, which was sustained by the chan-

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cellor, and the bill dismissed. From this decree the complainant has appealed to this court, and assigned errors.

The facts stated in the bill are in substance as follows:

That the said James K. P. Finley was before his death, the owner, by purchase, of the land described in the bill; that he died on the 27th day of August, 1906, in the State of Maryland, but was a citizen and resident of the State of Georgia; that at his death he was unmarried, and without father or mother, or child or children born to him in lawful wedlock; that he left no brother or sister, or the representatives of any brother or sister, either of the whole or half blood, except complainant; that in the year 1903 he filed a petition in the superior court of Fulton county, Ga., for the adoption of defendant James Finley, Jr., formerly James Jordan, and that said decree was enrolled in that court on the 20th of February, 1903; that on the 21st of September, 1906, after the death of the said James K. P. Finley on August 27, 1906, the mother of said child married her co-defendant, the said James Y. Brown, and immediately removed to the State of Alabama, and that she and her said husband, and her said child, James Finley, Jr., became citizens of Alabama from that date; that three days later, on September 24, 1906, one Courtland S. Winn, as alleged guardian of the estate of the said James Finley, Jr., filed his bill in the chancery court

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at Chattanooga, alleging, in substance, among other things, that, as the result of a certain litigation had in the State of Georgia, after the death of the said James K. P. Finley, the said Winn was appointed guardian of the child, James Finley, Jr., and given charge of his estate, which was a large one, lying in Georgia, Alabama, and Tennessee; that under said proceedings the defendant Lula Jordan Brown, the mother of the child, was given custody of his person; that the said Lula Jordan Brown and her husband, James Y. Brown, had instituted certain proceedings in the county court of Hamilton county, whereby the said James Y. Brown was appointed guardian of the said child, and had assumed possession of the property in Chattanooga claimed by the child as such adopted heir of James K. P. Finley, and that this appointment was improvidently granted and in violation of the results reached in the Georgia litigation just referred to; that the said Brown and wife were citizens of Alabama at the time the said guardianship was created in the county court of Hamilton county, this State; that on the 18th day of March, 1907, the present appellees, James Y. Brown, as the stepfather of the child, and Lula J. Brown, as the mother of the said child, filed their answer to the said bill of Winn, in which they admitted their citizenship to be in Alabama, and not in Georgia or Tennessee; that a decree in the Winn Case was entered adjudging that the said James Finley, Jr., was the owner of the property now in controversy, and directing the same to be turned

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over to his said stepfather as trustee; that this decree was pronounced on the 20th day of April, 1908; that complainant was not a party to said proceedings, and had no knowledge thereof until after the decree was rendered; that the first intimation he had of these proceedings was derived from his attorneys within thirty days of the filing of the present bill; that the said James K. P. Finley was never a citizen of Tennessee from the date of his purchase of the said land until his death; that neither the said James Finley, Jr., formerly James Jordan, nor his mother, Lula Jordan Brown, nor his said stepfather, was a citizen of Tennessee at the time said land was purchased by the said James K. P. Finley, at the date of the said adoption in Georgia, or any time subsequent thereto up to the date of the filing of the original bill in this cause.

It is conceded that James K. P. Finley, and the said child, were both domiciled in Georgia at the time the adoption proceedings were consummated in that State, and that these proceedings were in accord with the law of Georgia.

The section of the Georgia Code controlling the subject of adoption is as follows:

"Any person desirous of adopting a child, so as to render it capable of inheriting his estate, may present a petition to the superior court of the county in which said child may be domiciled, setting forth the name of the father, or, if he be dead or has abandoned his family, the mother, and the consent of such father or moth-

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er to the act of adoption; if the child has neither father nor mother, the consent of no person shall be necessary to said adoption. The court upon being satisfied with the truth of the facts stated in the petition, and of the fact such father or mother has notice of such application (which notice may be by publication, as required in equity cases for nonresident defendants), or, if the father, or mother, has abandoned the child, and being further satisfied that such adoption would be to the interest of the child, shall declare said child to be the adopted child of such person, and capable of inheriting his estate, and also what shall be the name of such child; thenceforward the relation between such person and the adopted child shall be, as to their legal rights and liabilities, the relation of parent and child, except that the adopted father shall never inherit from the child. To all other persons the adopted child shall stand as if no such act of adoption had been taken." Civ. Code 1895, Ga., sec. 2497.

The sections of the Tennessee Code upon the subject are as follows:

"Any person wishing to adopt another as his child shall apply by petition signed by the applicant, and setting forth the reasons therefor and the terms of said adoption." Shannon's Code, sec. 5409.

"The court, if it is satisfied with the reasons given, may sanction the adoption by decree entered upon the minutes embodying the petition and directing the terms of adoption." Id., 5410.

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"The effect of such adoption, unless especially restrained by the decree, is to confer upon the person adopted all the privileges of a legitimate child to the applicant, with capacity to inherit and succeed to real and personal estate of such applicant, as heir and next of kin; but it gives to the person seeking the adoption no mutual rights of inheritance and succession, nor any interest whatever in the estate of the person adopted." *Id.*, 5411.

The complainant insists upon the following propositions:

(1) That the *lex loci rei sitae* controls as to real estate; (2) that by this law (in the present instance, the statutes of descent and distribution of Tennessee) the *status* of complainant, as heir at law of James K. P. Finley, was immediately fixed and became vested on the 27th day of August, 1906, when the said Finley died, and that whatever title and interest he had in the land in controversy passed to complainant by operation of the said statutes of descent and distribution; (3) that the statute of adoption in the State of Georgia, and the decree of the Georgia court thereunder, by which James Finley, Jr., was adopted by James K. P. Finley, have, and could have, no extraterritorial effect, *ex proprio vigore*; (4) that the adoption statute of Georgia, and the decree of the Georgia court thereunder, could be made effective in Tennessee only under the rule of comity between the States of Tennessee and Georgia; (5) that the Georgia statute of adoption, and the decree of

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the Georgia court, and the rule of comity between Tennessee and Georgia, putting into effect the adoption statute, and the decree of the latter State, are both in conflict with the public policy of Tennessee, as declared by its statutes of descent and distribution, fixing the *status* of complainant as heir at law of James K. P. Finley immediately upon his death, and vesting complainant with the title to the land in controversy, and therefore they cannot be held operative in the present case; (6) that this rule of comity between Tennessee and Georgia, which alone could give effect and put into operation the said adoption statute of Georgia and the decree of adoption of its court thereunder, were not invoked by the said James K. P. Finley and the said James Finley, Jr., during the lifetime of the former, by their removal into Tennessee, thus bringing the *status* of the said James Finley, Jr., as fixed by said Georgia statutes and decree into Tennessee; that the said rule of comity was never invoked in Tennessee; that the filing of the bill above referred to by Courtland S. Winn, and the answer of Brown and wife and the child thereto, and the proceedings had thereunder, and the decree of the court thereon, did not invoke in Tennessee the rule of comity between the States of Tennessee and Georgia, to give effect to the said adoption statutes and decree thereunder; that if the same could be so treated, still these proceedings were all instituted after the *status* of complainant as heir at law of James K. P. Finley had been fixed by his death and the title to the

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land vested in the complainant; (7) that at the time the said proceedings were instituted, and up to the day of the filing of the original bill in the present case, the said James Finley, Jr., and his codefendants, were all citizens and residents of Alabama, and, therefore, incapable of invoking the law of comity between the States of Tennessee and Georgia, because they were nonresidents of the latter State; that, being residents of Alabama, a State which, through its judicial department, had declared the said James Finley, Jr., a bastard and incapable of inheriting the estate of the said James K. P. Finley, they can obtain no benefits under an alleged domiciliary *status* created by the laws of Georgia; (8) that defendants therefore acquired no rights under the said Winn bill, and that complainant being a stranger thereto was not controlled thereby, and that the same should be set aside as a cloud upon his title and his rights as the sole heir at law of his brother, James K. P. Finley, deceased.

We shall not take up these propositions in the order in which they appear above, nor, indeed, all of them, but such of them as we deem necessary to a proper decision of the case, and in such order as may seem most convenient.

We are relieved from considering the degree of strictness with which the foreign statute must be complied with, since in the present case no question is made in respect of that matter. Authorities upon this subject will be found collected in a note to *Chelak v. Battles*,

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12 Am. and Eng. Ann. Cas., 144, and *Beatty v. Davenport*, 45 Wash., 555, 88 Pac., 1109, 122 Am. St. Rep., 937, 13 Am. and Eng. Ann. Cas., 585, and note on page 587. We are likewise relieved from considering the question whether both the adoptive father and the adopted child must be really domiciled in the foreign State at the time the adoption is made, or whether temporary residence will be sufficient. There seems to be some diversity in the authorities upon this subject. *Foster v. Waterman*, 124 Mass., 594; *Wolfe's Appeal* (Pa.), 13 Atl., 760; *Van Matre v. Sankey*, 148 Ill., 536, 36 N. E., 628, 23 L. R. A., 665, 39 Am. St. Rep., 196. And see *Renz v. Drury*, 57 Kan., 84, 45 Pac., 71. In the present case there is no question that both parties were domiciled in Georgia at the time the adoption was had.

There is no doubt whatever, under the authorities in this country, that a child who, in a foreign State in which both it and the adoptive father are domiciled, has acquired under the laws of that State the *status* of child by adoption, must, under the comity of States, receive recognition of its *status* as child in every other State having substantially similar adoption laws, and must be held capable of succeeding to real property in accordance with the laws of the State where the property lies, if adopted children are capable of inheriting under the local law of the latter State. *Ross v. Ross*, 129 Mass., 246, 37 Am. Rep., 321; *Gray v. Holmes*, 57 Kan., 217, 45 Pac., 596, 33 L. R. A., 207; *Van Matre*

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v. *Sankey*, supra; *Melvin v. Martin*, 18 R. I., 650, 30 Atl., 467; *McColpin v. McColpin* (Tex. Civ. App.), 77 S. W., 238; *Woodward's Appeal*, 81 Conn., 167, 168, 70 Atl., 453; *Shick v. Howe*, 137 Iowa, 249, 114 N. W., 916, 14 L. R. A. (N. S.), 980.

It will not be amiss to give some excerpts from two or three of these authorities.

The leading case is *Ross v. Ross*. In that case it is said:

"It is a general principle that the *status* or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this *status* and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the *status* of those who claim succession or inheritance in his estate is to be ascertained by the law under which that *status* was acquired. His personal property is, indeed, to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulates the succession or the inheritance of persons having a *status*. . . . A person, for instance, who has the *status* of child of another person in the country of his domicile has the same *status* here, and as such

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takes such share of the father's personal property as the law of the domicile gives him, and such share of his real estate here as a child takes by the laws of this commonwealth, unless excluded by some positive rule of our law. Inheritance is governed by the *lex rei sitae*; but legitimacy is to be ascertained by the *lex domicilii*. If a man domiciled in England has two legitimate sons there and dies intestate, owning land in this commonwealth, both sons have the *status* of legitimate children here; but, by virtue of our statute of descents, the land descends to them equally, and not to the eldest son alone, as by the law of England."

In *Van Matre v. Sankey*, *supra*, it is said:

"The decree of adoption was a declaration by competent authority operative to change her *status*, and *ipso facto* to render her that which she was declared to be—the heir at law of Samuel Sankey—and capable of inheriting from him in all respects as if she had been his child born in lawful wedlock. The statute under which the adoption proceedings were had provides that the child shall be decreed to take the name of the adopting parents, and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child. The decree, by force of this statute establishing, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon an invested child with the rights and qualifications of a child and heir at law of Samuel Sankey.

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This we understand to be the construction of the statute by the courts of that State (Pennsylvania). The *status* of appellee, having been established under, and existing by virtue of, the *lex domicilii*, is to be recognized and upheld in every other State, unless such *status*, or the rights flowing therefrom are inconsistent with, or opposed to, the laws and policy of the State where it is sought to be availed of."

The principle has been recognized in two cases: *Woodward v. Woodward*, 87 Tenn. (3 Pickle), 644, 11 S. W., 892, and *Memphis Trust Co. v. Blessing*, 103 Tenn. (19 Pickle), 237, 58 S. W., 115. In the first of these cases it was held that a minor domiciled in another State, and emancipated under its laws from all disabilities of infancy, could recover and receive, in the same manner as adults, personal funds to which she was entitled by the law of her domicile, held for her by a guardian appointed and resident in this State, and administered under our laws; that the *lex domicilii* would control as to the ward's capacity. In the second case it was held a minor, domiciled in another State, by the laws of which she was emancipated from all the disabilities of infancy, was entitled to receive and recover in the same manner as an adult her real estate, as well as personal funds, having a *situs* and being at the time under control and possession of a guardian appointed and resident in this State.

An important qualification of the general doctrine is to be found in *Keegan v. Geraghty*, 101 Ill., 26, 41.

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This qualification is that in recognizing the foreign adoption, States acting by comity will not permit a statute of a foreign State to extend any further than the local statute upon the same subject, or to confer any other rights; thus pursuing the principle that the *lex loci rei sitae* must control in the disposition of real estate. So, in that case, inheritance through collaterals was not permitted, although it was permitted by the foreign statute; such collateral inheritance not being allowable under the local statute of adoption as construed by the court. To the same effect, see *Van Matre v. Sankey*, supra. There is authority, also, to the effect that, where the statute of adoption of the State recognizing by comity the foreign adoption is broader than the rights acquired under the foreign statute, such rights will not be enlarged, so as to be commensurate with those granted by the adopting statute of the State so acting by comity. *In re Sunderland's Estate*, 60 Iowa, 732, 13 N. W., 655.

The recognition of the *status* acquired by a foreign adoption, when confined as above indicated, cannot be held as a breach of the policy of that State in which the land lies, where such State has a law of adoption; nor can it be held a violation of the statutes of descent.

Upon this subject it is said, in *Ross v. Ross*, supra: "But this section [referring to the statute of descents] must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the *status* is to be created which gives the capacity to inherit. It does not undertake to prescribe

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who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words 'children' and 'child,' for instance, in the first clause, 'issue,' in the phrase 'if he leaves no issue,' in subsequent clauses, and 'kindred,' in the last two clauses, of this section, clearly include a child made legitimate by the marriage of its parents, and acknowledged by the father after his birth, under section 4 of the same chapter, or a child adopted under the provisions of chapter 110 of the General Statutes, or chapter 310 of the statute of 1871." To the same effect are *Fosburgh v. Rogers*, 114 Mo., 122, 21 S. W., 82, 19 L. R. A., 201, 205; *Re Wardell*, 57 Cal., 484, and *Power v. Hafley*, 85 Ky., 671, 4 S. W., 683. And see *Markover v. Krauss*, 132 Ind., 294, 31 N. E., 1047, 17 L. R. A., 806.

Our own statute of descents (Shannon's Code, section 4163 et seq.) provides that the land of an intestate shall be inherited "by all the sons and daughters of the deceased, to be divided amongst them equally;" and also if the estate was acquired by the intestate, and he died "without issue," his lands shall be inherited "by his brothers and sisters of the whole or half blood, born before his death or afterwards, to be divided amongst them equally." These provisions must be construed in connection with our statute of adoption, by which it is provided that the adopted child shall have "all the privileges of a legitimate child to the applicant, with capac-

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ity to inherit and succeed to the real and personal estate of such applicant, as heir and next of kin." So, when a foreign adoption is recognized by comity, the same relation is created; at least to the extent that such *status* is fixed by the foreign statutes, unless the powers purporting to be given thereby are greater than those conferred by our own statute. Each case, as above indicated, will be confined to the terms of our statute, which is quoted in full supra.

We do not think that any weight should be given to the contention that the adopted child should not be accorded superior rights to the complainant in the present case, because the principle of comity was not invoked until after the death of James K. P. Finley, and after the complainant had filed his bill in the present case, nor to the contention that the child cannot claim the benefits of the principle of comity because, when the present litigation began, he was domiciled in Alabama, nor to the contention that the *status* of complainant as heir at law of James K. P. Finley was immediately fixed and became vested on the 27th day of August, 1906, when the said Finley died. If the assumption underlying at least one of these contentions was sound, there never could be a recognition, by comity, of heirship in respect of one who had been adopted in a foreign State, nor, indeed, of any one occupying the *status* of a legitimate child in a foreign State, since the legitimacy in general depends upon marriage, and recognition of laws affecting this relation de-

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pend, also, upon the principle of comity. The truth is that the relation of parent and child is established by the decree of adoption in a foreign State, immediately upon the entry of such decree. It is not more necessary that the relationship thus created should be recognized in a foreign State before the death of the adoptive parent than it is that the natural relationship of the child residing in a foreign State should be discovered and recognized. Under the rule of comity necessarily the *status* of child is recognized as existing as of the date of its inception. It is a mistake, therefore, to say that if the rule were not invoked prior to the death of the adoptive parent, or before the child became domiciled in the State where the land lies, that one who would be heir under the local law, in case there were no child, would, by a kind of automatic intervention, take the land as heir at law. We do not find such suggestion in any of the cases, and it is manifestly unsound on principle. It is true that several of the cases mention the fact that the child had become domiciled in the State since the death of the adoptive parent, and was invoking the aid of the court; but none of them turn on that point. Indeed, in *Van Matre v. Sankey*, it appeared that both the child and the adoptive parent resided in California at the death of the latter. In *Shick v. Howe*, it did not appear that the child had become domiciled in Iowa. It did appear that the adoptive father was dead when the suit was brought. In *Gray v. Holmes*, it appeared that the adopted child had died, and recognition was given to

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her child, and it does not appear that the latter had removed into the State of Kansas.

It is insisted that recognition of a foreign adoption will tend to make land titles uncertain in this State, since it may happen, after titles have seemed to vest here in persons apparently heirs at law, and these lands may have been sold by such persons to other persons, a foreign adoption may be discovered and great confusion and loss ensue. The same results might follow on the discovery of a child born of a marriage in a foreign State not previously known here. There is nothing in the authorities to indicate that any practical inconvenience has arisen from either of these sources.

It is insisted that by recognizing a foreign adoption the law of this State would be subordinated to the laws of another State. There is nothing in this view, because this State will not, by comity, recognize the laws of any other State opposed to our own institutions or policy. We have already shown that there is no conflict between adoption laws and the statutes of descent.

There is another class of cases closely assimilated to those arising under heirship by adoption. These cases depend upon the principle that when an illegitimate child has, by the subsequent marriage of its parents, become legitimated by virtue of the laws of the State or country where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that *status*, including the right to inherit. *Miller v. Miller*,

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91 N. Y., 315, 43 Am. Rep., 669; *Dayton v. Adkisson*, 45 N. J. Eq., 603, 17 Atl., 964, 4 L. R. A., 488, 14 Am. St. Rep., 763; *Smith v. Kelly*, 23 Miss., 167, 55 Am. Dec., 87; *Scott v. Key*, 11 La. Ann., 232. And see 3 Am. and Eng. Enc. of Law, p. 897; Story on Conflict of Laws, p. 173.

The only authorities we have knowledge of which are in direct conflict with the rules thus stated are *Lingen v. Lingen*, 45 Ala., 410, *Williams v. Kimball*, 35 Fla., 49, 16 South., 783, 26 L. R. A., 746, 48 Am. St. Rep., 238, and *Smith v. Derr*, 34 Pa., 126, 75 Am. Dec., 641. All of these cases, however, are based upon the celebrated English case of *Birtwhistle v. Vardill*, 7 Clarke & Finnely, 895, in which it was held that a child born in Scotland of parents domiciled there, who, at the time of his birth, were not married, but who afterwards intermarried in Scotland, there being no lawful impediment to their marriage, either at the time of his birth or afterwards, though legitimate by the law of Scotland, could not take, as heir, the lands of his father in England. This latter decision was based upon what is called the "statute of Merton," which arose out of certain facts peculiar to the history of England, in connection with certain dependencies which it had at that time over sea—particularly Normandy, Aquitaine, and Anjou. The rule in those provinces and elsewhere on the Continent was that the subsequent marriage of the parents of an illegitimate child would make the child legiti-

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mate, and hence capable of inheriting. The question was constantly arising in the ecclesiastical court, and seems to have produced considerable uncertainty as to the true rule that should obtain. The matter was submitted by the bishops to the Parliament, with the request that the rule making the *antenatus* legitimate by the subsequent marriage of its parents should be declared as the law of England. The Parliament refused, and, on the contrary, declared that it was, and always had been, the law of England that none were legitimate heirs except those born in lawful wedlock. This declaratory statute had thus arisen, for the purpose of solving, so to speak, the very matter in doubt, and was regarded in the case referred to as settling it, and placing it beyond any question of comity. It was, as said by Lord Chief Justice Tindal, in the case just referred to, a matter of positive law, and a rule of property inhering in the lands, as it were. In other words, the statute was passed to cover precisely the question mooted. Of course, after that, the matter of comity was out of consideration. So strong, however, was the current of authority apparently against the courts of England, both on the Continent and in this country, that the matter was held under debate twelve years, and was repeatedly tried. The subject was illuminated by very learned arguments of counsel reproduced in the last report, and also by observations of the judges, particularly Lord Brougham, who criticised, at some length, the grounds on which the Lord Chief Justice placed his decision; but the latter was finally adopted by the House, as is seen by

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the observations of the Lord Chancellor, in his closing remarks at the foot of the case, and in a note of the result immediately following.

The supreme court of Alabama, in the recent case of *James Y. Brown v. Alex Finley*, 47 South., 577, 21 L. R. A. (N. S.), 679, involving that portion of James K. P. Finley's estate lying in Alabama, seemed to recognize that the weight of authority was against *Lingen v. Lingen*, supra, but said it had become a rule of property in that State, and followed it. *Williams v. Kimball*, supra, likewise followed the English case, and based its decision upon the statute of Merton. So of *Smith v. Derr*, supra; but the rule was afterwards changed in Pennsylvania. The English rules of succession do not apply in this State. The matter is governed by our own statutes, and there is nothing in the way of our recognizing the almost universal rule of comity, which gives credit to personal *status* acquired under foreign laws.

There are other cases cited by complainant (*Barnum v. Barnum*, 42 Md., 251; *Stoltz v. Doering*, 112 Ill., 234; *Sneed v. Ewing*, 5 J. J. Marsh, [Ky.], 460, 22 Am. Dec., 41; *Leonard v. Braswell*, 99 Ky., 528, 36 S. W., 684, 36 L. R. A., 707; *McCreery v. Davis*, 44 S. C., 195, 22 S. E., 178, 28 L. R. A., 655, 51 Am. St. Rep., 794); but they do not very closely bear upon the controversy, and we need not lengthen this opinion by a detailed examination of them.

It results that we find no error in the decree of the chancellor, and it must be affirmed.

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J. W. KELLY & COMPANY *et al.* v. S. A. CONNER *et al.*¹

and

JOHN H. CONNER *et al.* v. J. W. KELLY *et al.*

(Knoxville. September Term, 1909.)

1. CHANCERY JURISDICTION. None to enjoin prosecutions for violation of criminal laws.

The chancery court has no jurisdiction to enjoin pending or threatened prosecutions for the violation of the criminal laws of the State. This proposition, as a rule of general application, is unquestionably sound and well established in our jurisprudence. (*Post*, pp. 352, 353, 359-368, 397, 398.)

Case cited and approved: *Fritz v. Sims*, 122 Tenn., 137, and numerous cases in other jurisdictions cited in the opinion, pages 362-368.

Cases cited and distinguished: *Trading Stamp Co. v. Memphis*, 101 Tenn., 181; *Ignaz v. Knoxville*, 1 Tenn. Chy. App., 5; and numerous cases in other jurisdictions cited and reviewed in the opinion, pages 369-393.

2. SAME. Inherent and statutory jurisdiction is defined.

The inherent jurisdiction of our chancery court is the jurisdiction of the high court of chancery of England, which was adopted by North Carolina as the jurisdiction of the chancery court of that State before the session act ceding to the federal government the territory subsequently becoming Tennessee, and which was adopted in this State, upon its formation and organization, by its adoption of the laws of North Carolina, and in the crea-

¹As to injunction against criminal proceedings, see note to *Crighto v. Dahmer* (Miss.), 21 L. R. A., 84, and note to *Littleton v. Burgess* (Wyo.), 2 L. R. A., (N. S.), 631.

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tion of its chancery court; and the jurisdiction subsequently vested in said court by the legislature is called its statutory jurisdiction. (*Post*, pp. 360, 361.)

Code cited and construed: Sec. 6088 (S.); sec. 5022 (M. & V.); sec. 4279 (T. & S. and 1858).

Acts cited and construed: Acts 1835-36, ch. 4.

Constitution cited and construed: Art. 6, secs. 1 and 8.

Cases cited and approved: *Jackson v. Nimmo*, 3 Lea, 597; *Smith v. Bank*, 115 Tenn., 18.

- 3. POLICE POWER.** Statute prohibiting the sale of intoxicating liquors is within the police power of the State, provided there is no interference with interstate commerce.

The statute (Acts 1909, ch. 1), prohibiting the sale of intoxicating liquors, as a beverage, within four miles of any schoolhouse, is a police measure of general application, within the police power of the State, and enacted upon a subject over which the legislature has plenary power, provided there is no interference with interstate commerce. (*Post*, pp. 345, 373-376.)

Acts cited and construed: Acts 1909, ch. 1.

Cases cited and approved: *Webster v. State*, 110 Tenn., 504 (and citations); *Mugler v. Kansas*, 123 U. S., 623 (and citations).

- 4. CHANCERY JURISDICTION.** None to enjoin prosecutions for violation of a criminal law until its validity may be determined.

The chancery court of this State has no jurisdiction to enjoin prosecutions for the violation of a statute enacted under the police power until the court may construe it and determine its validity or invalidity. The construction and validity or invalidity of criminal statutes must be determined by the courts invested with the administration and enforcement of the criminal laws. (*Post*, pp. 376, 377.)

- 5. SAME.** To enjoin prosecutions under city ordinances, when and when not.

A prosecution or action for the violation of a municipal ordinance is a civil case, and not a criminal case; and where such ordi-

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nance is void, it seems that prosecutions under it may be enjoined for the protection and preservation of property rights, and to prevent their destruction, but prosecutions for the violation of ordinances imposing penalties for specific acts for the preservation of the peace and good order of the corporate community will not be enjoined. (*Post*, pp. 377, 378, 381, 382, 383, 384-393.)

Cases cited and approved: *Meaher v. Chattanooga*, 1 Head, 75; *Bristol v. Burrow*, 5 Lea, 128; *Wood v. Mayor*, 5 Heisk., 441; *O'Haver v. Montgomery*, 120 Tenn., 448; *Ignaz v. Knoxville*, 1 Tenn. Chy. App., 5; *Trading Stamp Co. v. Memphis*, 101 Tenn., 181; *Manufacturing Co. v. Los Angeles*, 189 U. S., 207; *Dobbins v. Los Angeles*, 195 U. S., 241; *Express Co. v. Ensley (C. C.)*, 116 Fed., 756; *Hutchinson v. Beckham*, 118 Fed., 399, 55 C. C. A., 333; *Railroad v. Catlettsburg (C. C.)*, 129 Fed., 427; *Atlanta v. Gaslight Co.*, 71 Ga., 106; *Mobile v. Railroad*, 84 Ala., 125; *Austin v. Cemetery*, 87 Tex., 330; *Baseball & Amusement Co. v. New Orleans*, 118 La., 228; *Fellows v. Charleston*, 62 W. Va. 665; *Coal Co. v. St. Louis*, 130 Mo., 323 (citing *Kansas v. Clark*, 68 Mo., 588; *Hollwedell*, 74 Mo., 395; *St. Louis v. Marchel*, 99 Mo., 475); *Poyer v. Des Plaines*, 123 Ill., 111; *Denver v. Beede*, 25 Colo., 172.

Cases to the contrary cited and approved: *Wardens v. Washington*, 109 N. C., 21; *Railroad v. Catlettsburg (C. C.)*, 129 Fed., 427; *Logan v. Telegraph Co. (C. C.)*, 157 Fed., 574.

6. SAME. None to construe criminal statutes, and enjoin prosecutions for their violation.

The chancery court has no jurisdiction to entertain a bill to construe a valid criminal statute, and pending the proceeding, or at its termination, enjoin prosecutions for violations of such statute. (*Post*, p. 393.)

Cases cited and approved: *Insurance Co. v. Craig*, 106 Tenn., 641; *Drug Co. v. Truett*, 97 Tex., 380; *Arbuckle v. Blackburn*, 113 Fed., 625.

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7. **SAME.** None to enjoin criminal prosecutions on account of multiplicity of suits.

The chancery court will not enjoin prosecutions for the violations of a statute (Acts 1909, ch. 1), prohibiting the sale of intoxicating liquors, as a beverage, within four miles of any schoolhouse, construed by the prosecuting officers to prohibit sales at wholesale as well as at retail, at the suit of operators of distilleries and breweries insisting upon the invalidity of the statute, and, if valid, that it does not apply to them as wholesalers, upon the ground that they will as wholesalers be subjected to a multiplicity of prosecutions; for on the first prosecution the validity and construction of the statute will be determined, and it is presumed that the prosecuting officers will not use their authority to harass, vex, and oppress citizens. (*Post*, p. 394.)

Cases cited and approved: *Denver v. Beede*, 25 Colo., 172; *Poyer v. Des Plaines*, 123 Ill., 111; *Brown v. Birmingham*, 140 Ala., 600, 601.

8. **SAME.** None to enjoin criminal prosecutions upon the ground of irreparable injury, when.

The chancery court will not enjoin prosecutions for violations of a statute (Acts 1909, ch. 1), prohibiting the sale of intoxicating liquors, as a beverage, within four miles of any schoolhouse, construed by the prosecuting officers to prohibit sales at wholesale as well as at retail, at the suit of operators of distilleries and breweries insisting upon the invalidity of the statute, and, if valid, that it does not apply to them as wholesalers, upon the ground that irreparable injury will result to them unless the relief is granted, where it appears that their sales before the enactment of the statute were chiefly in other States and countries, and where they may ship and store their products and dispose of them in sister States and foreign countries without loss. (*Post*, pp. 394, 395.)

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9. **SAME.** Same. Irreparable injury must be real and practically unavoidable to authorize injunction against criminal prosecution.

To authorize an injunction against prosecutions for the violation of a criminal statute, upon the ground that irreparable injury will result unless such relief is granted, the irreparable injury must be real and practically unavoidable and certain to follow, and not merely fancied, or a matter of inconvenience. (*Post*, p. 395.)

10. **SAME.** None to enjoin criminal prosecutions because of multiplicity of suits, irreparable injury, and invalidity of statute, where defense at law is adequate and unembarrassed.

The chancery court has no inherent or statutory jurisdiction to enjoin threatened criminal prosecutions under a statute enacted by a State in the exercise of the police power in relation to which the legislature has complete jurisdiction, although it be charged that the statute is invalid and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainants' defense thereto, in the court having jurisdiction of the offense, is adequate and unembarrassed. (*Post*, pp. 396, 397.)

11. **SAME.** Supreme court has no jurisdiction on appeal, where the chancery court had none.

Where the chancery court has no jurisdiction to entertain and determine a case on the merits, the supreme court on appeal from the chancery court cannot do so, but must dismiss it, though the case is of great public interest. (*Post*, p. 397.)

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.
T. M. M'CONNELL, Chancellor.

WILLIAMS & LANCASTER, LEWIS M. COLEMAN, SPEARS
& LYNCH, E. E. WRIGHT, JOHN J. VERTREES, and F.
ZIMMERMAN, for complainants.

ATTORNEY-GENERAL CATES, JOE V. WILLIAMS, and N.
L. BACHMAN, for defendants.

MR. JUSTICE SHIELDS delivered the opinion of the
Court.

These consolidated causes were heard together in the
chancery court of Hamilton county and in this court,
and will be so determined.

Complainants in the first-styled cause are J. W. Kelly
& Co., Wakeman Distilling Company, and Chattanooga
Brewing Company, all corporations created and organ-
ized under the laws of Tennessee, having their domiciles
and places of business in Chattanooga, Hamilton coun-
ty, Tenn., where they owned and operated distilleries
and a brewery, and were, previous to July 1, 1909, with-
out question, lawfully engaged in the wholesaling of
whiskies and beer.

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The defendants are S. A. Conner, sheriff of Hamilton county, and Matt N. Whittaker, district attorney of the State of Tennessee for the Sixth judicial circuit, of which Hamilton county is a part, and the mayor and aldermen of the city of Chattanooga, which is a municipal corporation located in Hamilton county.

Complainants brought their bill July 6, 1909, in the chancery court of Hamilton county, for the purpose of enjoining Matt N. Whittaker, as district attorney, and S. A. Conner, as sheriff, from instituting and prosecuting criminal actions against them for sales of whiskies and beer that they might make as wholesale dealers at their places of business in the city of Chattanooga, Hamilton county, Tenn., in violation of the provisions of an act of the general assembly of Tennessee, known as the "Sales Act" or "Four-Mile Law of 1909," being chapter 1, p. 3, of the published Acts of Tennessee of 1909, because, as they insist, that statute, when properly construed, does not apply to and prohibit sales of whiskies and beer by wholesale, and, further, that the statute was not enacted in the form and ceremony prescribed by the constitution of Tennessee, and its provisions violate certain other provisions of the constitutions of Tennessee and of the United States.

The statute sought to be construed and attacked—the "Four-Mile Law of 1909," or the "Sales Act"—was enacted January 20, 1909, and is in these words, viz.:

"An act to prohibit the sale of intoxicating liquors as a beverage near any school house, public or private,

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where a school is kept, whether the school be in session or not.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that it shall not be lawful for any person to sell or tippie any intoxicating liquors, including wine, ale, and beer as a beverage, within four miles of any schoolhouse, public or private, where a school is kept, whether the school be then in session or not, in this State, and that anyone violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction, shall be punished by fine for each offense of not less than \$50.00 nor more than \$500.00, and imprisonment for a period of not less than thirty days nor more than six months.

"Sec. 2. Be it further enacted, that the grand juries shall have and exercise inquisitorial powers in respect to violations of this act, and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

"Sec. 3. Be it further enacted that all laws in conflict with this act be, and the same are hereby repealed.

"Sec. 4. Be it further enacted, that this act shall take effect from and after July 1st, 1909, the public welfare requiring it."

Thereafter, February 4, 1909, the general assembly enacted another statute, known as the "Manufacturers Act" (Acts 1909, p. 21, c. 10) which prohibited the manufacture in this State, for the purpose of sale, of intoxicating liquors, including all vinous, spirituous, and

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malt liquors, imposing for its violation fine and imprisonment, and which by special provision was effective from and after January 1, 1910. It contains no provision in relation to the sale of intoxicating liquors.

The general assembly of Tennessee had before this legislation, enacted several other statutes prohibiting sales of intoxicating beverages within four miles of schoolhouses, the exact provisions of which it is not necessary to here set forth. The first of these statutes was enacted in 1877, being chapter 23, p. 37, of the Acts of 1877, and known as the "Four-Mile Law of 1877." The next was enacted in 1887, being chapter 167, p. 293, of the published acts of that year, and known as the "Four-Mile Law of 1887." This last act was amended from time to time, so that sales of intoxicating beverages were prohibited in practically every part of Tennessee, except the cities of Memphis, Nashville, Chattanooga, and La Follette. Whether sales by wholesale or only by retail were prohibited by this legislation is not now necessary to be considered; these acts being only referred to that the objections made by complainants to the "Four-Mile Law of 1909" may be fully understood.

Complainant's charge in their bills that the statute called in question (chapter 1, Acts 1909), when properly construed, does not prohibit sales made by wholesale dealers, but that, if otherwise construed, in its enactment and provisions, article 2, section 17, and article 1, section 8, of the constitution of Tennessee and the "due process clause" and "commerce clause" of the fed-

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eral constitution were violated, and that it is for these reasons void. Complainants' contentions fully appear in their assignment of errors, which will be set out in a subsequent part of this opinion.

Complainants, for the purpose of showing a case within the jurisdiction of a court of equity, and to enable them to present the constitutional objections made to the provisions of the statute, further charge:

That, when the Sales Act was enacted January 20, 1909, they were, and had been for many years previous thereto, engaged in the lawful manufacture and sale, as wholesale dealers, of whiskies and beer in the city of Chattanooga, where they had their distilleries and brewery, their warehouses and places of business, having customers in Tennessee and many other States of the Union, and one of them in Mexico and the Philippine Islands; that their plants represented investments of many thousands of dollars, and their businesses were established, valuable, and profitable, all of which would be greatly depreciated in value, and rendered almost worthless, if they were prohibited from making sales of their whiskies and beer in Chattanooga.

That J. W. Kelly & Co. had on hands January 20, 1909, stored in its own warehouses and that of the United States, 7,500 barrels of whiskey, of the value of \$700,000, and after deducting what it could sell by diligent efforts, about 1,500 barrels, and adding what it thereafter manufactured, it had in stock July 1, 1909, about 8,000 barrels; that the Wakeman Distilling Com-

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pany had on hands January 20, 1909, 1,600 barrels of whisky, of the value of \$135,000, of which it was only able to sell 500 barrels, leaving remaining July 1, 1909, 1,100 barrels, and that much of this whisky was raw, and required several years to age and mellow it, and make it marketable, and for that purpose it was in the bonded warehouse of the government. The Chattanooga Brewing Company, when the law was passed, had in stock 22,329 barrels of beer, afterwards manufactured 44,922 barrels, and sold 40,531 barrels, leaving on hands July 1, 1909, 26,000 barrels, of the value of \$200,000, if it could there be sold.

That the value of this property consisted in its salability, and that, if complainants were prohibited from selling it, its value would be greatly depreciated and destroyed, and they would suffer irreparable loss and injury.

They further charge that there are numerous school-houses, where school is kept, in Hamilton county, and all other counties of the State, so situated that there is scarcely any territory which is not within four miles thereof, unless it be in some small, sparsely settled portions of the State.

They further charge that the defendant M. N. Whitaker, district attorney, has construed the Sales Act to prohibit all sales of intoxicating beverages, whether by wholesale or retail, in which construction the defendant S. A. Conner, sheriff, concurs, and that these officers have announced their intention to arrest and prosecute

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all persons making such sales in Hamilton county, and that they will do so if not prohibited by the injunctive process of the chancery court, notwithstanding, as complainants are advised and charge, the said "Sales Act" does not apply to sales made by wholesale, or for the purpose of exportation to other States and countries, and is also unconstitutional and void for the reasons heretofore stated.

They further charge:

"To do business, complainants must sell and make many sales of the liquors they have, and every sale will constitute an offense, if the said law be valid and forbid wholesale sales. The punishment imposed is both fine and imprisonment—a punishment extremely severe. To cease to sell will break up and destroy the business of complainants and cause their said valuable properties to become a loss on their hands. To sell will subject them to numerous prosecutions and expensive trials, which they aver and say they ought not to be subjected to, inasmuch as said act is void, and, if valid, does not forbid or make unlawful wholesale sales—the only kind of sales complainants propose to make; and

"Because of this situation complainants say that they are entitled, as law-abiding citizens of Tennessee, to invoke the injunctive powers of this court for their protection. They charge and say that the act which, if it be criminal at all, constitutes the crime, is the act of selling their liquors, which act of selling is the only way in which they can use and enjoy the same; and the said act

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of selling claimed to be criminal is a property act, and not one which in itself affects the right of any other person, in any way—that is, the act of selling, claimed to be criminal, is the sole and only form in which complainants can enjoy, use, and utilize their property hereinbefore described.”

The prayer of the bill, other than that for process, is in these words:

“That the writ of injunction issue now, restraining and enjoining defendants, and every one of them, personally and officially, their agents, deputies, police and subordinates, from

“(a) Attempting to arrest, and from arresting, any of complainants for making any wholesale sale of the intoxicating liquors they now have, whether they were on hand January 20, 1909, or not, at their respective places of business in the bill described, in Hamilton county, Tennessee, at any time either before or after July 1, 1909, in violation of said Sales Act of January 20, 1909; and from

“(b) Preparing or preferring and prosecuting any indictment against them, or any of them, in the criminal court of Hamilton county, Tennessee, for making any such sale or sales above described; and that

“(c) Said Sales Act be declared and decreed not to prohibit sales of intoxicating liquors by wholesale dealers in wholesale packages or quantities, in Tennessee; and that

“(d) Said act be declared not to prohibit such

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wholesale sales by dealers in such incorporated towns in Tennessee as may be lawfully made under chapter 167 of the Acts of 1887, hereinbefore mentioned, as the same stood amended before said Sales Act of January 20, 1909, was passed; and that

“(e) Said Sales Act of 1909 be decreed to be unconstitutional and void; and that

“(f) Injunction granted be made perpetual.”

In the second bill, filed by John H. Conner, a stockholder of appellant J. W. Kelly & Co., against J. W. Kelly & Co., its president, Carl White, and the official defendants, practically the same facts are set out and the same contentions made as in J. W. Kelly & Co.'s original bill; the proceeding being one by a stockholder to enjoin the company and its president from shutting down the business because of the Sales Act of 1909, which is charged to be inapplicable to wholesale dealers and unconstitutional, and an injunction being prayed because of the irreparable damage to said Conner's interest in the company.

The causes were consolidated and heard by the chancellor upon motions made by defendants to dismiss the bills for want of equity and jurisdiction, upon the grounds that the suits were for the purpose of enjoining threatened criminal prosecutions by the authorized officers of the State of Tennessee, and were in effect suits against the State, and the application of the complainants for a provisional injunction. The chancellor

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overruled the motion to dismiss, sustained the jurisdiction of the court, and refused to grant an injunction further than to enjoin the defendants from interfering with interstate sales and shipments by complainants, and enjoined J. W. Kelly & Co. from ceasing to do an interstate business.

The defendants then answered, substantially admitting the facts charged in the complainants' bills, and the causes were set for hearing on bills and answers.

The chancellor, upon final hearing, sustained the constitutionality of the Sales Act, and held that it prohibited all sales, whether by wholesale or retail, within four miles of a schoolhouse, except those made for interstate shipment, which he held were not prohibited, and pronounced a decree accordingly, granting a perpetual injunction against all interferences with sales for shipments to other States and countries.

Complainants and defendants prayed separate appeals to this court and perfected them.

The errors assigned by complainants are these:

"First. The court erred in holding that the selling of intoxicating liquors at wholesale—that is, sales in wholesale packages or quantities, and not for consumption at the place of sale—was prohibited by the 'Four-Mile Act of 1909,' being chapter 1 of the Acts of the fifty-sixth general assembly of the State of Tennessee.

"Second. The court erred in holding that said act was not in violation of article 2, section 17, of the constitution of Tennessee: (a) In that the prohibition of the

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sales of liquor within four miles of a schoolhouse was not embraced in the title, which prohibits the sale near any schoolhouse, etc.; and (b) in that the wholesaling of liquor is not a sale as a beverage, and, therefore, not expressed in the title; and (c) in that it is in violation of that part of the above section to the effect that: 'All acts which repeal, revise or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revised or amended.'

"Third. The court erred in holding that said act, as construed by that court, was not in violation of article 1, section 8, of the constitution of Tennessee, and 'the due process of law' clause of the fourteenth amendment to the federal constitution, for that, under the 'Manufacturers Act,' the manufacturer may sell at wholesale till January 1, 1910, while the wholesaler cannot, which discrimination is unreasonable and arbitrary and class legislation.

"Fourth. The court erred in not holding that said 'Four-Mile Act,' as construed, was violative of section 21 of article 1, and section 8 of article 1, of the constitution of Tennessee, and amendment of the federal constitution, and section 1 of the fourteenth amendment of the same."

Those assigned by M. N. Whittaker and S. A. Conner are as follows:

"First. The court erred in overruling the first ground of the motions to dismiss the bills 'for want of equity,' because no ground of equity jurisdiction what-

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soever is shown in said bills, and they were filed solely to interfere with and enjoin criminal proceedings which complainants allege they feared were about to be instituted by the defendants as officers charged with the duty of enforcing the criminal laws of the State, and particularly chapter 1 of the Acts of 1909, prohibiting sales of intoxicating liquors as a beverage within four miles of a schoolhouse where school is kept.

"The sole purpose of the bills is to prevent defendants in their official capacity from performing their lawful functions in the execution of chapter 1 of the Acts of 1909, and to take the opinion of the court upon the constitutionality of said act, which is a valid constitutional statute of the State of Tennessee, so that no ground of equitable cognizance is presented in the bills, and they should have been dismissed for want of equity.

"Second. The court erred in not dismissing the bills as to the defendants Whittaker, district attorney for the Sixth judicial circuit, and Conner, sheriff of Hamilton county, because, as to these defendants, said bills were, in effect, suits against the State.

"In order to determine the effect of a suit, the court will look behind the parties named as defendants on the record, and, if the State be affected in the same manner as though it had been named on the record, the suit is in legal effect against the State, and not maintainable. In the enforcement of her criminal laws, the State can only appear in the circuit and criminal courts of the State through and by her district attorneys, and she

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can only apprehend and bring before the circuit and criminal courts offenders against her laws by the sheriffs and their deputies, so that to enjoin the district attorney from preferring and prosecuting indictments and the sheriff from making arrests thereunder is in effect to enjoin the State from administering and executing statutes enforceable only in the circuit and criminal courts of the State.

"Third. The court erred in not sustaining the second and fourth grounds of the motions to dismiss the bills, because the court was without jurisdiction of the subject-matter of the bills, and has no power to interfere with the enforcement of the criminal laws of the State.

"The sole purpose of the bills is to enjoin prosecutions, and arrests thereunder, against complainants, as wholesale dealers, for selling intoxicating liquors as beverages in wholesale quantities in violation of chapter 1 of the acts of 1909, and a court of equity in this State has no jurisdiction, either inherently or by statute, to interfere with or enjoin prosecutions for offenses against the criminal laws of the State, which are administered solely in courts having criminal jurisdiction.

"Fourth. The court erred in not sustaining, as to the defendants Whittaker and Conner, the third and fifth grounds of the motions to dismiss the bills, because these defendants are made parties solely in their official capacity, and a court of equity in this State is without jurisdiction to interfere with or control the action of a district attorney in prosecuting indictments or present-

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ments for the State, or the sheriff in making arrests under the authority of criminal process issuing in the name and at the instance of the State.

"Fifth. The court erred in holding and decreeing that chapter 1 of the Acts of 1909 does not prohibit complainants from selling at their places of business in Hamilton county intoxicating liquors to be shipped to customers in other States, and in enjoining the defendants from prosecuting, arresting, or interfering with complainants 'in the selling of such liquors for shipment to other States and territories of the Union or in foreign countries,' and in enjoining 'J. W. Kelly & Co., and its officers and agents, from closing the business of selling intoxicating liquors for shipment out of Tennessee.'

"The act of 1909 (chapter 1), makes unlawful all sales of intoxicating liquors as beverages within four miles of a schoolhouse in Tennessee after July 1, 1909, so that any sale of intoxicating liquors as beverages by the complainants after July 1, 1909, at their respective places of business in Hamilton county, the same being within four miles of a schoolhouse where school is kept, as shown in the bills, would be in violation of the plain terms and provisions of said act. Said act does not seek to interfere with mere shipments of liquors out of the State, and no claim is made by the bills that the defendants, or either of them, sought either to prevent such shipments or claim that complainants had no right to make such shipments; but, even conceding to the

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complainants the right to ship their liquors out of the State, such right does not include the right to make a sale thereof at their places of business in Tennessee. "While the learned chancellor does not so state, it is inferable from his holding that he was of the opinion that complainants are, under the commerce clause of the federal constitution, protected in their alleged right to make sales at their places of business in Hamilton county for shipment out of the State. But in such holding he erred, for the reason that the commerce clause of the federal constitution affords no protection to goods sold in the State, and intended to be shipped out of the State, but only protects goods from the time interstate transportation actually begins and until such goods are delivered to the consignee.

"Sixth. The appellant city of Chattanooga specially assigns that the learned chancellor erred in granting any decree whatsoever against it, not only for the reasons above stated, but particularly because no facts whatsoever are averred in the bills entitling complainants to relief against it.

"The sole averment of the bills in any way affecting Chattanooga is that the chief of police and police officers of said city have notified complainants that their officers and agents would be arrested every time any sales were made by such officers and agents contrary to the orders of the attorney-general.

"It is not shown that these police officers of the city of Chattanooga were acting under any authority or in-

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structions conferred upon them by the city of Chattanooga, or that the city of Chattanooga had taken any cognizance whatsoever, by ordinance or otherwise, of the subject-matter of the Four-Mile Act of 1909, so that any decree against appellant city of Chattanooga was wholly unwarranted.

"Seventh. The chancellor erred in granting any relief whatsoever in the case of *John H. Conner v. J. W. Kelly & Co. et al.*, because the bill in that case is unknown to the forms of a court of equity, in that it is an attempt by a minority stockholder of a corporation to compel the managing officials of such corporation to violate, by continuing sales of intoxicating liquors within four miles of a schoolhouse, a valid, constitutional statute of the State."

The first, second, and third assignments of error of defendants M. N. Whittaker and S. A. Conner challenge the jurisdiction of the chancery court to entertain complainants' bills, determine the questions made, and grant the relief prayed. Therefore these assignments must be first disposed of.

We will first examine the objection raised by the first and third assignments, to the effect that the chancery court has no jurisdiction to enjoin pending or threatened prosecutions for violation of the criminal laws of the State.

This proposition, as a rule of general application is unquestionably sound and well established in our jurisprudence.

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The several constitutions adopted by this State have all provided for chancery courts and circuit courts, the one courts of equity jurisdiction and the other of common-law jurisdiction. The present constitution, adopted in 1870, further provides that the jurisdiction of the chancery court shall be as then established by law until changed by the legislature. Const., art 6, sections 1, 8; *Jackson v. Nimmo*, 3 Lea, 597.

The general assembly of Tennessee (chapter 4, p. 32, Acts 1835), enacted that the chancery courts should continue to have all the powers and jurisdiction properly and rightfully incident to a court of equity by existing laws, and this was carried into our Code enacted in 1858 in section 4279.

When Tennessee was organized into a sovereign State, it adopted all the laws of the State of North Carolina at the time the territory composing it was ceded to the federal government. *Smith v. Bank*, 115 Tenn., 18, 89 S. W., 392.

The jurisdiction and procedure of the high court of chancery of England was adopted by North Carolina as the jurisdiction of the chancery court of that State before the cession act, and was therefore adopted in this State when our chancery court was created. This is what is called the "inherent jurisdiction" of the chancery court, and that which has been subsequently vested by the legislature is called the "statutory jurisdiction." *Gibson's Suits in Chancery*, section 23.

There has been no statute enacted in this State which

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confers upon the chancery court the jurisdiction to enjoin criminal prosecutions, and therefore we must look to its original and inherent jurisdiction to determine the question now presented. This must be found in the decisions defining and declaring that jurisdiction of this court, the federal courts, in which this original and inherent jurisdiction was also vested, and in those of other States having similar jurisdiction, and the text-books upon the subject of recognized authority.

The question arose in the case of *Fritz v. Sims*, in which the opinion was delivered by the present chief justice, and to be found reported in 122 Tenn., 137, 119 S. W., 63. There, as in the case at bar, the complainant brought his bill to enjoin threatened prosecutions under a statute imposing punishment by fine and imprisonment for its violation, which, as claimed by the officer whose duty it was to enforce it, prohibited the complainant from using and disposing of property to which he asserted title, because, as complainant claimed, the statute upon a proper construction did not apply to his property, and that, if it did, it deprived him of his property without due process of law, impaired the contract under which he held title, and was in contravention of the provisions of the constitutions of Tennessee and of the United States. The statute there in question was the game law of Tennessee, and the property was fish in a lake claimed as private property.

The chief justice, in disposing of the case, said:

"It will thus be seen that the chief, and in fact the

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only, purpose of the complainant in the institution of this suit, was to obtain relief by injunction from the annoyance of further prosecutions for assumed violations of this act in question. That the chancery court is without jurisdiction to grant such relief, we think, is well settled by the authorities"—citing 2 Story, Eq., Juris., section 893; 3 Pomeroy, Eq., section 1361, note; 22 Cyc., 903; 16 Am. and Eng. Ency. of Law, 370.

There is no case decided by this court to the contrary or allowing any exception to the rule there stated.

We will however, upon account of the great importance of the case now under consideration, both because of the public interest and the value of the property involved, again examine the question.

The general rule is stated by Mr. Daniell in his work on Chancery Practice and Pleading, at page 1620, thus:

"The court will also refuse an injunction to stay proceedings in any criminal matter. The court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, an indictment, an information, or a writ of prohibition."

In Beach's Modern Eq. Pr., vol. 2, section 761, the rule is stated as follows:

"It is the rule of almost universal application, both in England and in this country that a court of equity has no jurisdiction by injunction to restrain a criminal proceeding whether it be by indictment or summary process."

Suess v. Noble (C. C.), 31 Fed., 855, was a bill to re-

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strain by injunction certain State officers of Iowa from enforcing the penal provisions of the prohibition statute of that State. In denying the application, Judge Love, among other things, said:

"That no such power exists—that its exercise has been denied both in England and this country for centuries—is beyond question. This will be placed beyond all doubt by the authorities cited below. Whoever will for a moment consider the nature and grounds of equity jurisdiction will not fail to see insuperable objections to the exercise of any restraining power whatever in equity over the course of criminal proceedings. . . .

"Again, public offenses are prosecuted in England in the name of the king, and in the United States in the name of the State. It is manifest that neither the king nor the State could be made a defendant to a bill in equity. The restraining power of the court would be futile as against them, and it would avail nothing for the court to address its restraining process to public and private prosecutors, even if the power to do so existed, since the State would readily find other agents to represent it in the criminal proceeding. Courts of equity, therefore, deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases, and they will not, therefore, interfere by injunction with the course of criminal justice"—citing *Kerr v. Corporation of Preston*, 6 Ch. Div., 463; *Saull v. Brown*, 10 Ch. App., 64; *Moses v. Mayor*, 52 Ala., 198; *Joseph v. Burk*, 46 Ind., 59; *Gault v. Wallis*, 53 Ga., 675.

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In *Hemsley v. Myers*, 45 Fed., 283, 287, Judge Caldwell, of the United States circuit court, in dissolving an injunction restraining threatened criminal prosecutions under the Kansas prohibition statute, which had been granted by the district judge, said:

"The bill seeks to enjoin criminal proceedings. A court of equity possesses no such power. This principle is settled by the uniform current of authorities in England for two centuries, and in this country from the foundation of its jurisprudence. The recent emphatic reaffirmance of the doctrine by the supreme court of the United States renders it unnecessary to do more than repeat the rule in the language of that court."

In re Sawyer, 124 U. S., 200, 8 Sup. Ct., 482, 31 L. Ed., 402, the supreme court of the United States, speaking through Mr. Justice Gray, said:

"From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process. . . .

"Lord Chancellor Hardwicke, while exercising the power of the court of chancery incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to

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stay criminal proceedings, saying: 'This court has not originally, and strictly, any restraining power over criminal prosecutions.' And again: 'This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' *Mayor & Corporation of York v. Pilkington*, 2 Atk., 302, s. c., 9 Mod., 273; *Montague v. Dudman*, 2 Ves., Sr., 396, 398.

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney-General v. Cleaver*, 18 Ves., 211, 220; *Turner v. Turner*, 15 Jurist, 218; *Saull v. Browne*, L. R., 10 Ch., 64; *Kerr v. Preston*, 6 Ch. D., 463.

"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur., section 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State or under municipal ordinances"—citing *West v. Mayor, etc., of New York*, 10 Paige (N. Y.), 539; *Davis v. American Society for Prevention of Cruelty to Animals*, 75 N. Y., 362; *Tyler v. Hamersley*, 44 Conn., 419, 422, 26 Am. Rep., 479; *Stuart v. Board of Supervisors*, 83 Ill., 341, 25 Am. Rep., 397; *Devron v.*

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First Municipality, 4 La. Ann., 11; *Levy v. Shreveport*, 27 La. Ann., 620; *Moses v. Mayor, etc., of Mobile*, 52 Ala., 198; *Gault v. Wallis*, 53 Ga., 675; *Phillips v. Mayor, etc., of Stone Mountain*, 61 Ga., 386; *Cohen v. Goldsboro Commissioners*, 77 N. C., 2; *Waters-Pierce Oil Co. v. Little Rock*, 39 Ark., 412; *Spink v. Francis* (C. C.), 19 Fed., 670, and (C. C.), 20 Fed., 567; *Suess v. Noble* (C. C.), 31 Fed., 855.

The authority of this case is questioned upon the ground that the exact point was not involved; but it has been, from the time the opinion was delivered, recognized as correctly defining the jurisdiction of courts of equity in this matter, and has been approved and followed in numerous cases decided by the courts of the United States and of many of the States, and the objection for these reasons is without force.

In *Brown v. Birmingham*, 140 Ala., 600, 601, 37 South., 173, 174, the supreme court of Alabama, speaking through Chief Justice McClellan, in dismissing a bill of this character, said:

“But apart from all these considerations—or looking to them only as some of the reasons underlying the broad proposition now to be announced—the general rule is that the chancery court is wholly without jurisdiction to enjoin such quasi criminal prosecutions, however great and irreparable the damages to result from them to the party complaining may in fact be. It is not the sort of case in which the court can interfere, though the consequences to the complainant of allowing the

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prosecutions to proceed may be ever so grievous and irreparable. This statement of the doctrine includes of necessity and leads to the proposition that the insolvency of the municipality under the supposed authority of which the prosecutions are to be instituted, and of its officers proceeding therein, is altogether, immaterial. The administration of State and municipal governments, in the prosecutions of alleged violators of their penal laws or of violators of their supposed criminal laws, must be left to take its own course in the courts ordained to administer those laws, unhindered by the courts of equity, whose activities are in general strictly confined to matters of a purely civil nature; and this though such administration may wrongfully entail damages upon the citizens which are grievous indeed, and beyond all remedy, either because in their nature irreparable or because he is balked of their recovery by the insolvency of those responsible for the prosecutions. There are, it is true, some so-called exceptions to the general rule we have stated; that is, there are some cases in which prosecutions for alleged violations of penal ordinances may be enjoined. But it would perhaps be more apt to say that injunctions in such cases may be granted as incidental and ancillary to the exercise of some acknowledged equity jurisdiction, resting upon other bases than the mere harassment of prosecutions under void ordinances, than that the cases form an exception to the general rule."

There are numerous other cases in which the rule

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as stated has been announced and jurisdiction denied, among which are, viz.: *Cohen v. Commissioners of Goldsboro*, 77 N. C., 2; *Wardens v. Washington*, 109 N. C., 21, 13 S. E., 700; *Scott v. Smith*, 121 N. C., 95, 28 S. E., 64; *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W., 511; *Greiner-Kelley Drug Co. v. Truett*, 97 Tex., 377, 79 S. W., 4; *City of Bainbridge v. Reynolds*, 111 Ga., 759, 36 S. E., 935; *Paulk v. Mayor*, 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772, 69 Am. St. Rep., 128; *Crichton v. Dahmer*, 70 Miss., 602, 13 South., 237, 21 L. R. A., 84, 35 Am. St. Rep., 666; *Whitmore v. Mayor*, 67 N. Y., 27; *Boin v. Jennings*, 107 La., 410, 31 South., 866; *Thompson v. Tucker*, 15 Okl., 486, 83 Pac., 413; *Rhodes & Jacobs Mfg. Co. v. New Hampshire (C. C.)*, 70 Fed., 721; *Arbuckle v. Blackburn*, 113 Fed., 617, 51 C. C. A., 122, 65 L. R. A., 864; *Burnett v. Craig*, 30 Ala., 135, 68 Am. Dec., 115.

There are also other authorities of high character, which, while conceding the general rule to be that the jurisdiction of courts of equity is confined and limited to civil and property rights, hold that there are well-defined and established exceptions to it, one of which is that, when these rights are wrongfully affected and injured by an invalid criminal law, courts of equity have the power to, and will, under certain conditions and circumstances, enjoin prosecutions for violations of the law, to protect and preserve such rights and property and prevent loss and irreparable injury that would otherwise follow.

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Lord Justice Turner, in *Emperor of Austria v. Day and Kossuth*, 3 De Gex, F. & J., 253, said:

"But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property; but I think there are here rights of property quite sufficient to found jurisdiction in this court."

The case of *Louisiana State Lottery v. Fitzpatrick et als.*, 3 Woods, 222, Fed. Cas. No. 8541 (15 Fed. Cas., 871), involved this question. The Louisiana State Lottery was organized under a statute of Louisiana in the year 1868 (Act No. 25, p. 24, of 1868). It built up an enormous business and its franchises were extremely valuable. In April, 1879, the legislature of that State repealed the act incorporating the company, and made it a misdemeanor, punishable by fine and imprisonment, for any one thereafter to engage in the lottery business. Thereupon the lottery company filed a bill against the city of New Orleans, enjoining all prosecutions under this act, on the ground that it impaired the contract entered into between the company and the State.

The court said:

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“Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation: That it is only when those matters are not connected with the rights of property with respect to which the court has jurisdiction. *Attorney-General v. Cleaver*, 18 Ves., 211. In *Macauley v. Shacknell*, 1 Bligh (N. S.), 6 Eq., 558, the vice chancellor says: ‘The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with the crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable for use or occupation.’ ”

The case of *Logan & Bryan v. Postal Telegraph Co.* (C. C.), 157 Fed., 574, was to enjoin the “bucket shop” law of Kansas. It is there said:

“That a court of equity has no power to restrain criminal proceedings, with few exceptions, is the established rule in England as well as in the courts of the United States”—citing *Sawyer Case*, and others. “The exceptions are where the equity proceedings are instituted by a party in the suit already pending before the court, and are in the nature of ancillary proceedings, or where the complainant had acquired property rights, which, by the enforcement of the criminal laws enacted thereafter, would be destroyed and rendered worthless.”

In *Dobbins v. Los Angeles*, 195 U. S., 241, 25 Sup.

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Ct., 22 (49 L. Ed., 169), where the city passed an ordinance prohibiting the erection of gas works within certain limits, after having given complainant authority to erect works within those limits, and fixing penalties for infraction of the ordinance, a bill was filed to enjoin the enforcement of the ordinance, to which a demurrer for want of jurisdiction was filed, and sustained by the lower court. Justice Day in rendering the opinion of the supreme court, reversing the lower court, said:

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

Complainants also cite, as sustaining their position, the cases of *Ignaz v. Knoxville*, 1 Tenn. Ch. App., 5; *Trading Stamp Co. v. Memphis*, 101 Tenn., 181, 47 S. W., 136; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 388, 14 Sup. Ct., 1047, 38 L. Ed., 1014, *Smyth v. Ames*, 169 U. S., 542, 18 Sup. Ct., 418, 42 L. Ed., 819; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S., 220, 23 Sup. Ct., 498, 47 L. Ed., 778, *Vance v. Vandercok*, 170 U. S., 438, 18 Sup. Ct., 674, 42 L. Ed., 1100; *Ex parte Young*, 209 U. S., 159, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, and a number of others, to all of which we will hereafter refer.

While there is not as great a conflict in the authorities upon this question as seemingly appears from the excerpts quoted, some does exist, growing, doubtless,

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out of the unequal development and extension in this country of the inherent jurisdiction of courts of equity, by judicial decision and statutory enactment. This was to some extent made necessary in the federal courts by our dual system of government and the new and complicated conditions with which those courts have been called upon to deal. And it would be remarkable if a harmonious and uniform rule had been adhered to in all these independent jurisdictions for more than one hundred years.

We are dealing solely with the jurisdiction of the chancery court of this State. There may be cases involving civil and property rights, where courts of equity have power to enjoin threatened criminal proceedings, under invalid statutes and ordinances, injuriously affecting those rights, when it is absolutely necessary to protect the jurisdiction of the court over the property. We refer to cases where the court has jurisdiction of the property upon some acknowledged ground of equity jurisdiction, and the injunction is merely incidental and ancillary, in order to preserve that jurisdiction and make it effective. Whether this be so or not, we are not now called upon to decide, as no such case is presented in this record.

Complainants' contention is that an exception to the general rule exists in all cases where civil and property rights are involved, and a multiplicity of prosecutions under an invalid statute will greatly injure and ultimately destroy those rights, resulting in irreparable

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loss, and that the case presented by them is one of that character. We will only determine whether there is an exception which will authorize a chancery court of this State to exercise the jurisdiction and grant the relief sought, as against a statute of the character of the one here attacked, and upon the facts appearing in this record.

We will first examine the statute charged to be invalid, and the case upon which the complainants seek to enjoin the defendants from enforcing it.

This act was passed by the general assembly in the exercise of the police power vested in the State. If it is within the police power, the legislature had plenary power to deal with the subject-matter. There is no doubt now but what the regulation and prohibition of the sale of intoxicating liquor is within the police power of the several States, provided there is no interference with interstate commerce.

In *Webster v. State*, 110 Tenn., 504, 82 S. W., 182, Mr. Justice Wilkes, speaking for this court, said:

"The traffic in intoxicating liquors is universally recognized as a proper subject for police regulation, and may be controlled, restricted, or even totally prohibited, without violating any constitutional right under the police power. 22 Am. and Eng. Ency. Law (2d Ed.), p. 927, and cases cited; *Boston Beer Company v. Massachusetts*, 97 U. S., 25, 24 L. Ed., 989; *Bartemeyer v. Iowa*, 18 Wall., 129, 21 L. Ed., 929; *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205.

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"The regulation, restriction, and even prohibition of the liquor traffic being clearly within the police power of the State, it is for the legislature to decide when the exigency exists for the exercise of that power, and its exercise is not to be controlled by the courts. *Powell v. Pennsylvania*, 127 U. S., 683, 8 Sup. Ct., 992, 32 L. Ed., 253 (Rose's Notes)."

And as bearing upon the validity and extent of legislation upon this subject, in the same opinion, it is said:

"And the exercise of this power with respect to the manufacture and sale of intoxicating liquors, even to the extent of abolishing them, is not a denial of an equal protection of the law, nor a violation of the fourteenth amendment to the constitution of the United States."

The case of *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273, 31 L. Ed., 205, in which the validity of the Kansas prohibition law is sustained, is a leading case upon these questions. We quote from the syllabus, which correctly states the holding of the court:

"Legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States.

"It belongs to the legislative department to exert what are known as the 'police powers' of the State, and to determine, primarily, what measures are appropriate

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or needful for the protection of the public morals, the public health, or the public safety—subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the constitution.

“Government does not interfere with, nor impair, any one’s constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage.”

And in the opinion Mr. Justice Harlan says:

“If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medicinal, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.”

This statute is purely a police measure of general application. It has no special reference to complainants or their property. It does not invade or appropriate property, nor in any way affect the title or in-

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terfere with the possession of the owners. It does not impair the obligation of contracts.

Complainants' case, presented in their bill, is that, when properly construed, the statute does not apply to them and their business as wholesale dealers, but, if it does, it is invalid, and that, notwithstanding its inapplicability and invalidity, the officers of the State, whose duty it is to enforce criminal laws, are threatening them with prosecutions so numerous that, should they be mistaken in their positions, the excessive fines that may be adjudged against them would practically bankrupt them, and that for this reason, and the fear of their employees of arrest, fine, and imprisonment, they are deterred and prevented from carrying on and conducting their business and from selling their property as they have the right to do, if the statute does not prohibit wholesaling or is unconstitutional for any of the reasons charged; and their contention that civil and property rights are involved is predicated upon the charge that the value of their property—the whisky and beer owned by them—consists in its salability, and that the threatened prosecutions under the law, by deterring them from making sales, destroy this value, and the use and enjoyment of the property.

When reduced to its last analysis, their suit is simply one to enjoin the officers of the State from prosecuting them for pursuing a business, made unlawful by a statute enacted in the exercise of the police power, until they can have it construed, and its validity or

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invalidity determined, by the chancery court, instead of by that court created for the purpose of administering it and all other criminal laws. Have the chancery courts of this State jurisdiction to entertain a bill for this purpose?

We think not.

We do not think the cases relied upon by complainants, when analyzed, and the special facts and circumstances thereof are considered, support their contention that courts of equity have such jurisdiction.

We will now briefly examine those cases.

The case of *Ignaz v. Knoxville*, supra, was a bill to enjoin the city of Knoxville from collecting a privilege tax in excess of its municipal powers. The decision of the court of chancery appeals was rested upon the authority of *Trading Stamp Company v. Memphis*. While it was affirmed by this court, it does not appear whether it was upon this ground or not. The case of *Trading Stamp Company v. Memphis*, supra, does not sustain that decision. That was a bill to enjoin the legislative council of the city of Memphis from passing an ordinance which was in excess of the authority vested in that municipality and *ultra vires*, and not to enjoin prosecutions under an existing ordinance. Again, these were not criminal, but civil, actions. They are, therefore, not in point here.

Austin v. Day and *Kossuth*, supra, and *Springhead Spinning Company v. Riley*, L. R., 6 Eq., 558, English cases, were suits, not to enjoin a criminal prosecution, but the commission of crimes, which invaded property

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rights. While the principle involved is analogous, these cases are not authority for the present contention. Notwithstanding this, these cases are cited in a number of other cases relied upon by complainants as authority.

Schandler Bottling Company v. Welsh (C. C.), 42 Fed., 563, is an opinion delivered by the district judge in granting a preliminary injunction, and exactly the contrary was held by the circuit judge upon a motion to dissolve the injunction; the case being heard for this purpose with that of *Hemsley v. Myers*.

The question is not raised or decided in the case of *Vance v. Vandercok*.

Reagan v. Farmers' Loan & Trust Company, Smyth v. Ames, and *Perkins v. Northern Pacific Ry. Co.* (C. C.), 155 Fed., 445, under proceedings in which the case of *Ex parte Young* arose, and which is hereafter referred to under the latter style, were bills brought by trustees for bondholders and the stockholders of railroad companies to enjoin the enforcement of tariff rates, fixed in two of the cases by the general assemblies of Nebraska, and Minnesota, and in the other by the railroad commissioners of Texas under a statute of that State, upon the ground that they were unreasonable and confiscatory, and denied to the railroad companies the equal protection and due process of law. The chief question of jurisdiction in these cases was whether the suits were actions against the several States; but injunctions were granted restraining suits

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in the State courts for penalties and crimes denounced for violation of the rates fixed, as ancillary to the relief which was the gravamen of the bills. Here property rights were directly involved. The right to charge reasonable tariff rates was the most valuable franchise of the railroad companies, and their very existence depended upon their right to exercise it. The statute fixing the rate so low as to be confiscatory directly invaded and destroyed this right. The question involved, and which the bills were brought to have determined, the reasonableness of the tariff rates fixed, was not one over which the general assembly had complete jurisdiction, as in ordinary police measures, but, as was held in all of these cases, one of a judicial nature. In other words, while the legislature has the right to fix tariff rates, the determination of whether they are reasonable or confiscatory is one vested in the courts. The railroad companies were also great quasi public corporations, charged with duties to the public which involved transactions daily with thousands of people, which they could not refuse to perform without danger of forfeiture of their corporate franchises and a multiplicity of civil and criminal actions. Their defense in both classes of actions involved complicated accounts and difficult computations, which could only be made by skillful experts and according to the practice of courts of equity, and, therefore, their defense at law was greatly embarrassed and wholly inadequate. These were the real grounds upon which

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the equitable jurisdiction was sustained, and the injunctive relief granted was only incidental and ancillary, to protect the property of which the court had assumed jurisdiction, and enable it to give full and complete relief. Without the aid of an injunction in these cases, the railroad companies would have been compelled to put in effect the confiscatory rates pending the decision of the federal courts upon their validity, and would thus have been compelled to render service without compensation, and part with property involved in the litigation without any adequate remedy for recovery. This would have been irreparable injury. These cases also involve questions arising under the constitution of the United States, to determine which the complainants had the right to invoke the jurisdiction of the federal courts, and that jurisdiction would have availed nothing if the property, in the meantime, could be greatly depreciated in value and destroyed by proceedings instituted in the State courts. These reasons for sustaining jurisdiction in those cases fully appear from the opinions delivered, especially in *Smyth v. Ames* and *Ex parte Young*. In the latter case the jurisdiction is also put upon the ground that the proceeding in the State court was begun subsequent to that in the federal court. In that case, on page 161 of 209 U. S., page 454 of 28 Sup. Ct. (52 L. Ed., 714, 13 L. R. A. [N. S.], 932), it is said:

“It is further objected (and the objection really forms part of the contention that the State cannot be

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sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the State law. This, as a general rule is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout v. Starr*, 188 U. S., 537, 544, 23 Sup. Ct., 398, 47 L. Ed., 584. But the federal court cannot, of course, interfere in a case where the proceedings were already pending in a State court. *Taylor v. Taintor*, 16 Wall., 366, 370, 21 L. Ed., 287; *Harkrader v. Wadley*, 172 U. S., 148, 19 Sup. Ct., 119, 43 L. Ed., 399.

"Where one commences a criminal proceeding who is already a party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. *Davis, etc., Co. v. Los Angeles*, 189 U. S., 207, 23 Sup. Ct., 498, 47 L. Ed., 778. In *Dobbins v. Los Angeles*, 195 U. S., 223, 241, 25 Sup. Ct., 18, 22 (49 L. Ed., 169), it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordi-

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nance may be reached and controlled by a court of equity.' *Smyth v. Ames*, supra, distinctly enjoined the proceedings by indictment to compel obedience to the rate act.

"These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. *In re Sawyer*, 124 U. S., 200, 211, 8 Sup. Ct., 482, 31 L. Ed., 402, is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings; but it expressly states an exception, 'unless they are instituted by a party to the suit pending before it and to try the same right that is in issue there.' Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the State authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States circuit court. The right to restrain proceedings by *mandamus* is based upon the same foundation and governed by the same principles."

And on page 166 of 209 U. S., page 456 of 28 Sup. Ct. (52 L. Ed., 714, 13 L. R. A. [N. S.], 932), it is further said:

"Such remedy is undoubtedly the most convenient, the most comprehensive, and the most orderly way in which the rights of all the parties can be properly,

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fairly, and adequately passed upon. It cannot be to the real interest of any one to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected. The question of sufficiency of rates is important and controlling, and, being of a judicial nature, it ought to be settled at the earliest moment by some court, and when a federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other courts. This is all that is claimed, and this, we think, must be admitted."

This case also decides that excessive fines and punishment, so great as to deter a party from rendering himself liable therefor, may be a denial of due process, and ground for federal jurisdiction, but does not hold it is a ground of equitable jurisdiction.

Central Trust Company v. Citizens' Street Ry. Co. (C. C.), 80 Fed., 219, was also a tariff rate case. The statute in question reduced the rates and diminished the value of the corporate franchises of the street railway company, and thus directly involved property. What we have said in relation to the railroad cases above discussed applies to this case.

The cases of *City of Atlanta v. Gate City Gaslight Company*, 71 Ga., 106, and *Port of Mobile v. Railroad Company*, 84 Ala., 125, 4 South., 106, 5 Am. St. Rep., 342, involved ordinances which were effective, or being

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so enforced, to destroy corporate rights and franchises. These were property rights which were being unlawfully invaded and destroyed, and the suits were for their protection and preservation. Attention is called to the fact that in other cases decided by the courts of last resort in both Georgia and Alabama, involving statutes and ordinances of the character here under consideration, the jurisdiction was denied.

The case of *Louisiana State Lottery Company v. Fitzpatrick* has been stated. The repealing act destroyed the franchise of the complainant, upon which its very existence depended, and violated the contract made between it and the State. Therefore it directly affected property rights and operated to absolutely destroy them.

Austin v. Austin Cemetery, 87 Tex., 330, 28 S. W., 528, 47 Am. St. Rep., 114, was a suit brought to enjoin an invalid ordinance prohibiting burials in a cemetery belonging to complainants under severe penalties. The jurisdiction to enjoin the city from enforcing the penalties was sustained; but in the case of *Wardens v. Washington*, 109 N. C., 21, 13 S. E., 700, seeking similar relief against a like ordinance, jurisdiction was denied. The latter case, for well-known reasons, is more persuasive than the former in the courts of this State.

The cases of *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 23 Sup. Ct., 498, 47 L. Ed., 778,

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and *Dobbins v. Los Angeles*, 195 U. S., 241, 25 Sup. Ct., 18, 49 L. Ed., 169, involved the same facts and the same invalid city ordinance. Mrs. Dobbins had obtained a permit from the city to erect gas works in territory where the same were allowed, and contracted with a company for the erection of the works, and expended considerable money in that way. The city then passed an ordinance prohibiting the erection of such works in that territory under certain penalties. Davis & Farnum Manufacturing Company, who had contracted to do part of the construction, brought their bill to have the ordinance declared void, and the city enjoined from bringing a multiplicity of suits against it for continuing the work. When the case reached the supreme court of the United States, it was held that the ordinance was arbitrary and discriminatory, and impaired the obligation of the city's contract with Mrs. Dobbins; and it is there said that in such cases the federal courts of equity could maintain a bill to adjudge the invalidity of the ordinance and enjoin a multiplicity of suits for its violation. But the complainant's bill was dismissed because no case of irreparable damage was shown. Mrs. Dobbins brought her bill in the circuit court of the United States upon the same facts, and to obtain the same relief, and it was sustained upon the authority of the former case.

These cases are criticised in *Camden Interstate Railway Co. v. Catlettsburg* (C. C.), 129 Fed., 427, and *Logan & Bryan v. Postal Telegraph Co.* (C. C.), 157

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Fed., 574, and the ruling said to be confined to the special facts presented. The property of Mrs. Dobbins was evidently intentionally discriminated against, with the purpose of destroying it, and was of such character, and in such condition, that its value would have been destroyed, but for the intervention of a court of equity. That is not the case at bar.

N. O. Baseball & Amusement Co. v. New Orleans, 118 La., 228, 42 South., 784, 7 L. R. A. (N. S.), 1014, 118 Am. St. Rep., 366, is a bill brought to enjoin an ordinance of the city of New Orleans prohibiting the establishment and operation of a baseball park within certain territorial limits, with penalties for its violation. The complainant, before the passage of the ordinance, had purchased property in that territory costing \$40,000 for a ball park, and it brought its bill, charging that the ordinance was invalid upon the ground that it was deprived of its property without due process of law, and impaired property rights protected by the federal constitution. The supreme court of Louisiana, after referring to the cases decided by it holding that courts of equity had no such jurisdiction, sustained the bill upon the authority of *Dobbins v. Los Angeles*, because a federal question was involved. We do not understand why the court understood that the *Dobbins Case* was controlling, rather than those determined by it in defining the jurisdiction of the courts of the State.

Fellows v. Charleston, 62 W. Va., 665, 59 S. E., 623, 13 L. R. A. (N. S.), 737, 125 Am. St. Rep., 990, in-

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volved an invalid municipal ordinance prohibiting the erection of buildings without a permit under penalties. Complainant's bill to have the ordinance declared void and enjoin prosecutions under it, upon the ground that it unlawfully deprived him of the use of his property, was sustained upon the authority of *Dobbins v. Los Angeles*.

Greenwich Ins. Co. v. Carroll (C. C.), 125 Fed., 121, was a bill attacking as invalid a statute of Iowa regulating insurance companies, and to enjoin criminal prosecutions for violations of it. District Judge McPherson, upon demurrer, held that it could be sustained. This case is perhaps more in point than any other relied upon by complainants, and does sustain their contention.

Hutchinson v. Beckham, 118 Fed., 399, 55 C. C. A., 333, and *Southern Exp. Co. v. Mayor of Ensley* (C. C.), 116 Fed., 756, were bills filed to obtain a definite determination of the validity of ordinances imposing license taxes upon the complainants, and to establish complainants' right to do business in the cities enacting the ordinances, and enjoin vexatious litigation for penalties imposed. These cases, like a large number of the others relied upon by complainants, involved municipal ordinances, suits for penalties under which were enjoined, and have no bearing on the case at bar. Penalties denounced by municipal ordinances are not crimes or misdemeanors, and actions to recover them are not criminal, but civil, in their nature. This was

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expressly held in the case of *Southern Express Co. v. Mayor of Ensley*. It is there said:

"A license imposed for revenue is the exercise of the taxing, not the police, power, and prosecutions before the corporate tribunal for doing the business without a license are quasi penal at most. In substance and legal effect, they are civil proceedings. *Royall v. Virginia*, 116 U. S., 583, 6 Sup. Ct., 510, 29 L. Ed., 735. The 'offense' here, if there is any law to support it, does not in any wise interfere with the control of the local tribunals over the mass of governmental powers committed to them for the welfare of the people of Ensley under what, for want of a better name, we denominate the 'police power.' It is about prosecutions for offenses under ordinances directed solely to that end that many of the authorities are strict in holding that courts of equity must not interfere."

In *Camden Interstate Railway Co. v. Catlettsburg*, supra, after discussing cases in which an injunction will be granted to restrain criminal prosecutions where property rights are involved, this is said:

"Likewise that line of cases must be distinguished from those which uphold the right of a court of equity to enjoin proceedings to enforce payment of penalties prescribed for nonpayment of taxes or license fees that are illegal on the ground that thereby multiplicity of suits is prevented. Such proceedings are civil in their nature."

In the case of *Royall v. Virginia*, 116 U. S., 572, 6

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Sup. Ct., 510, 29 L. Ed., 735, Mr. Justice Matthews said:

"As the sum demanded for the license is a tax, the provision for the punishment of one who pursues his profession without a license is a part of the revenue system of the State, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it. It is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information. The present case, therefore, stands precisely, so far as the constitutional questions arising in it are affected, as if it were a civil action in which the commonwealth of Virginia was plaintiff, seeking to recover the amount due on account of the tax and penalty."

Sylvester Coal Co. v. St. Louis, 130 Mo., 323, 32 S. W., 649, 51 Am. St. Rep., 566, a bill to enjoin penal actions under a municipal ordinance, is to the same effect. It is there said:

"The doctrine that the criminal statutes cannot be tested, or their enforcement restrained, in the civil courts has no application to the case. Municipal statutes: *Kansas v. Clark*, 68 Mo., 588; *Ex parte Hollwedell*, 74 Mo., 395; *St. Louis v. Marchel*, 99 Mo., 475, 12 S. W., 1050. They are quasi criminal in form, but not so regarded in procedure.

"We think the petition presents a case in which the validity of the ordinances may be inquired into by a

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court of equity, and, if found to be invalid, the relief prayed for may be granted."

This is well settled in Tennessee, and all such actions are held to be civil, and not criminal, cases, and they need not be begun by presentment or indictment. *Meagher v. Chattanooga*, 1 Head, 75; *Bristol v. Burrow*, 5 Lea, 128; *Wood v. Mayor*, 5 Heisk., 441; *O'Haver v. Montgomery*, 120 Tenn., 448, 111 S. W., 449.

While some of the cases discussed support complainants' contention, the majority of them do not; the jurisdiction of the court being sustained upon some well-established ground of equity jurisdiction, and upon facts and circumstances which are not present in this case, and the injunctive relief being merely incidental and ancillary. Many of them were also suits against municipal corporations, which can be sued, and the proceedings enjoined were merely civil actions. For these reasons, they are not applicable or authority in this case.

We will not review at length the cases holding that the jurisdiction does not exist.

The majority of them were bills brought to enjoin prosecutions under statutes and ordinances, alleged to be illegal, in which the complainants claimed that, without injunctive relief, in their business and property they would suffer great and irreparable injury, and were remediless save in a court of equity, and are directly in point here. Those of *Suess v. Noble*, *Hemsley v. Myers*, *Paulk v. Mayor*, *Burnett v. Craig*, *Thompson v.*

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Tucker, and *Boin v. Jennings* were brought to enjoin prosecutions under laws and ordinances enacted in the States of Kansas, Iowa, Alabama, Georgia, Oklahoma, and Louisiana, in the exercise of the police power, to prohibit sales of intoxicants, alleged to be invalid, and in all of them jurisdiction was denied. It is true that some of these cases were bills filed to enjoin the enforcement of ordinances, but that only makes the case of the defendants stronger. They extend the rule further than defendants are here claiming it to be. The property which the complainants in the cases we are now discussing charged would be injured and destroyed was less valuable than that owned by complainants in this case; but the principle was and is the same. There must be one law for the rich and the poor. If complainants' bill could be sustained, every owner of a saloon would have the right to the same remedy, although his property, instead of being of the value of thousands of dollars, was that of only a few hundred; and it cannot with reason be insisted that every one who would suffer a small injury from the operation of a police measure can stay the enforcement of the law until he can have its validity, or applicability to his case, inquired into in a court of equity.

Courts of equity are not constituted to deal with crime and criminal proceedings. If the law be held valid, they cannot punish the complainant for the offenses committed, or compensate those injured by his wrongful action while the hands of the officers of the

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law are stayed by injunction. The exercise of the jurisdiction contended for would greatly confuse and embarrass the enforcement of the police power, and, upon sound principles of public policy, it ought not to be favored.

The case of *Poyer v. Des Plaines*, 123 Ill., 111, 13 N. E., 819, 5 Am. St. Rep., 494, involved an ordinance alleged to be invalid, and suits for penalties under it were sought to be enjoined. The court said:

"If the authorities of this village can be enjoined from prosecuting under an ordinance preservative of the peace (as this one certainly is), so they might be restrained from the enforcement of any other ordinance of the village. Their effort to discharge their duty to the public would be rendered unavailing, and the community left at the mercy of the lawless and vicious elements of society until such time as the question could be settled in the court of equity. If it should at last be determined that the ordinance was valid, that court would be powerless to enforce its provisions or impose the penalties denounced against its violation, but must remit the cases to the courts of law, which, before the assumption of jurisdiction by the courts of equity, had the right to determine every question submitted and determined in the equity jurisdiction."

In *Denver v. Bredde*, 25 Colo., 172, 54 Pac., 624, a bill was brought to enjoin suits for penalties imposed by an ordinance, charged to be void; and, in holding that the chancery court had no jurisdiction to entertain it, it is said:

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"The fallacy of granting a writ of injunction in cases of this character on the facts detailed by appellee in his bill is quite evident. If the question of the validity of the ordinance was before us for determination, and we should decide in favor of its legality, yet, notwithstanding appellee admits its violation, no judgment could be pronounced or directed against him therefor in this case; and hence the necessity of applying the rule strictly that equity will not interfere with the prosecution of actions at law, except in cases where the applicant for such relief brings himself clearly within its purview. The object of the ordinances imposing penalties for specific acts, is to protect and preserve the peace and good order of the corporate community, as criminal proceedings are intended for the preservation of the peace and dignity of the State; and if every offender against such ordinances could invoke the interposition of a court of equity against their enforcement, by charging illegality, or by multiplying his offenses, municipal authorities would be paralyzed in discharging the public duties intrusted to them."

Without doubt, courts of equity have no jurisdiction to entertain a bill to construe a valid criminal statute, and pending the proceeding or at its termination, enjoin prosecutions for violations of it. *Insurance Co. v. Craig*, 106 Tenn., 641, 62 S. W., 155; *Greiner-Kelley Drug Co. v. Truett*, 97 Tex., 380, 79 S. W., 4; *Arbuckle v. Blackburn*, 113 Fed., 625, 51 C. C. A., 122, 65 L. R. A., 864.

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The embarrassment of which the complainants complain is one which all who enter into a business or purchase property subject to the control of the police power must take into consideration and be prepared for. Complainants can have the statute construed and its validity determined in any criminal action that may be brought against them in a court of Hamilton county having criminal jurisdiction. They will not be in any way embarrassed in making their defenses in that court. If the law is as they insist, it will be there so decided, and they will be discharged. If it is valid, and applies to them, they will be properly convicted. We do not think the apprehension of vexatious litigation and multiplicity of suits is made out. This is wholly within the control of the complainants; for, unless, they violate the law, no indictments will be preferred against them. When this bill was filed, no prosecutions had been begun. We cannot presume that the defendants, as officers, will, or that the criminal court of Hamilton county will, permit complainants to be vexed and harassed by a multiplicity of suits, if it be there determined, in the first case brought to trial, that the statute either does not apply to complainants, or is invalid. The presumption, to the contrary, is that these officers will not use their official authority to vex or oppress citizens, and such unlawful conduct will not be anticipated. *Denver v. Beede*, supra; *Poyer v. Des Plaines*, supra; *Brown v. Birmingham*, supra.

Complainants have also failed to show a case of ir-

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reparable injury and loss, which is absolutely necessary upon their own contention. The bill contains allegations to this effect; but the court will always look behind charges of this kind, and see if the facts stated sustain them. We find that the property of complainants, the value of which they claim will be destroyed if they are unable to sell it in Chattanooga, is a staple article, not subject to immediate deterioration, and much of which must be kept for years in order to make it marketable, and for which the distilleries had established a market and large demand in other States of the Union and foreign countries, where they can sell and dispose of it without loss. Their sales must have been chiefly to parties away from Chattanooga, and in other States, before the enactment of the law, as the territory in which intoxicating beverages could be lawfully sold in this State was then very limited. They are not prohibited by the statute from storing or shipping their whiskies and beer. Irreparable injury must not be fancied, or a matter of inconvenience, but must be real and practically unavoidable, and certain to follow. There is not here that clearness and certainty of either the right of complainants, or of the damages that will follow, to justify a court of equity to enjoin threatened proceedings at law in any case. 16 Am. and Eng. Ency. of Law, p. 358.

From a careful review and consideration of all the authorities discussed, we are of the opinion that the weight of judicial opinion and text-book law is with

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the ruling of this court in *Fritz v. Sims*, supra, and, with possibly some modification in cases where the court has assumed jurisdiction of property on other grounds, and the injunction is merely ancillary, we adhere to it.

We are further of the opinion that courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a State in the exercise of the police power in relation to which the legislature has complete jurisdiction, although it be charged that the statute is invalid and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainants' defense thereto, in a court having jurisdiction of the offense, is adequate and unembarrassed; and we hold that the chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction, have any such power or jurisdiction, whatever may be the exceptions to the general rule in the courts of equity of other jurisdictions.

We are also of the opinion that the complainants have not presented in this record a case of irreparable injury, and that they can have the benefit of all the questions they have made in regard to the validity of the statute which they attack in a court of criminal jurisdiction, and that their bill does not disclose anything which would embarrass them in making those defenses, or render them inadequate, if good in law, upon a trial

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under presentment or indictment according to the practice of such courts.

This conclusion disposes of the case. The chancery court having no jurisdiction to entertain and determine the case upon the merits, this court cannot do so; and we do not decide anything in regard to the merits or other questions than the one just disposed of. The only decree we can and will pronounce is one of dismissal and adjudging costs.

We regret that the case must take this course, because of the public interest in the proper construction of the statute in question, the importance of it to many citizens of the State, and the rest and quietude that a final decision of it would bring to those interested.

All the questions presented in the case have been ably and elaborately argued by brief and at the bar, and the court has given much consideration to them.

The question will, almost to a certainty, be in some form presented, and the court could now with more ease dispose of it than at any other time. We cannot, however, without usurping jurisdiction, do so.

The rule which prevents a court of chancery from interfering with the administration of the criminal laws of this State is a wise one, founded upon sound principles of public policy, and, if we had the power to do so, we fear that changing it would result in much confusion and embarrassment in preserving peace and order, and enforcing the police power of the State generally, which would outweigh the good that would follow an

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immediate decision of this case upon the merits. The injury to the general public, which would ultimately result from the exercise of this jurisdiction, would be greater than that to individuals when left to their remedies in courts of law.

We therefore feel compelled to sustain the first and third assignments of error of the defendants, and dismiss the bill for the want of jurisdiction of a court of chancery of this State to entertain it.

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ELDRIDGE HORD v. HOLSTON RIVER RAILROAD COMPANY
*et al.*¹

(Knoxville. September Term, 1909.)

1. **RAILROADS.** Owner of land through which a right of way has not been acquired may recover damages, but not if such right of way has been acquired.

A railroad company may blast rock on its right of way to level its roadbed; but if, in doing so, it casts rock upon, and injures, the land of an adjoining owner, whose land has not been condemned, and who has not conveyed or agreed to convey a right of way, he may recover damages for the injury done; but not so as to the owner of a tract through which a right of way has been condemned, or who has conveyed or agreed to convey a right of way through it, as such injury from blasting prudently done, without negligence, would be deemed to have been within the contemplation of the parties when the damages were assessed in the condemnation proceeding, and to have been covered by the award or consideration. (*Post*, p. 407.)

Cases cited and approved: *Carriger v. Railroad*, 7 Lea, 388; *Railroad v. Hays*, 11 Lea, 389; *Railroad v. Mossman*, 90 Tenn., 157; *Railroad v. Higdon*, 111 Tenn., 121; *Dodge v. Commissioners*, 3 Metc. (Mass.), 380; *Brown v. Railroad*, 5 Gray (Mass.), 35; *Cary v. Morrison*, 129 Fed., 177; *Sabin v. Railroad*, 25 Vt., 363, 370, 371.

2. **SAME.** Damages for negligent construction or blasting, though right of way has been acquired.

An assessment of damages for the condemnation of a railroad right of way does not cover injuries caused by negligent construction of the road or negligent blasting on the right of way,

¹As to duty of those engaged in blasting as to the safety of others, see note to *Blacknell v. Moorman & Co.* (N. C.), 17 L. R. A., 729.

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nor injuries inflicted on a tract other than that out of which the right of way was taken. (*Post*, pp. 407, 408.)

Cases cited and approved: *Carriger v. Railroad*, 7 Lea, 388; *Railroad v. Hays*, 11 Lea, 389; *Railroad v. Mossman*, 90 Tenn., 157; *Railroad v. Higdon*, 111 Tenn., 121.

3. SAME. Sale and conveyance of right of way covers all damages recoverable in a condemnation proceeding.

A landowner's agreement for the sale of a right of way and his conveyance thereof to a railroad company covers all damages, of whatever sort, suffered by him in connection with the tract out of which the right of way was carved, and to which he would have been entitled in a condemnation proceeding. (*Post*, p. 408.)

Cases cited and approved: *Railroad v. Swank*, 105 Pa., 555, 561; *Hannaher v. St. Paul, etc., Co.*, 5 Dak., 1, 14; *Canal Co. v. Lee*, 22 N. J. Law, 243, 250; *Hodge v. Railroad*, 39 Fed., 449, 451; *Norris v. Railroad*, 28 Vt., 99; *Watts v. Railroad*, 39 W. Va., 196; *Railroad v. Smith*, 111 Ill., 363; *Connell v. Railroad*, 81 Ill., 232.

4. SAME. Where a railroad is not liable for blasting and casting rock upon adjoining land, it is liable for its failure to remove it.

Where a railroad company is not liable for casting rock upon adjoining land in blasting its roadbed through such right of way, nevertheless its duty is to remove the rock so cast within the shortest time in which it can be done, and with the least injury to the land, and it is liable for a breach of this duty. (*Post*, pp. 408, 409, 413.)

Case cited and approved: *Sabin v. Railroad*, 25 Vt., 363, 370, 371.

5. SAME. Liable for use of way in hauling to and from its right of way.

A railroad's use of adjoining land for wagon ways in hauling to and from its right of way in preparation and construction of its road is not within the appraisal of damages for the con-

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demnation or conveyance of the right of way, except as to the mere right of access, and hence the railroad company is liable for the use of such ways. (*Post*, p. 409.)

Case cited and approved: *Sabin v. Railroad*, 25 Vt., 363, 370, 371.

6. SAME. Not liable for blasting resulting in injuries to buildings, crops, and fences adjoining the right of way, when.

Injury to adjoining buildings by blasting operations on a railroad's right of way, and injury to crops and to fences, in so far as they are exposed to the blasting operations, are within the appraisal or consideration paid the landowner for the railroad right of way, as incidental damages, for which he is not entitled thereafter to recover additional damages. (*Post*, p. 409.)

Cases cited and approved: *Railroad v. Stovall*, 12 Helsk., 1; *Vaulx v. Railroad*, 120 Tenn., 316, 329, 330; *Dodge v. Commissioners*, 3 Metc. (Mass.), 380.

7. SAME. Cost of removal of stone, with interest, not with rents, is the measure of damages for blasting and casting rock upon adjoining land.

Where a railroad company, in blasting operations on its right of way, casts a quantity of stone on adjoining land, the measure of its liability is the cost of removing the stone from the land, to which is to be added the interest from a reasonable date for completing the removal, but not the rental value of the land. (*Post*, pp. 409, 410, 411.)

8. SAME. Liable for value of land only where cost of removing rock blasted and cast upon it is more than its value.

Where land adjoining a railroad right of way was so injured by the casting of rock upon it by blasting operations on the right of way that the cost of removing the rock would be more than the value of the land, the railroad's liability was the market value of the land so injured, viewed as a separate parcel, and not in connection with the whole farm of which it was a part. (*Post*, pp. 410, 411.)

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- 9. CHANCERY PRACTICE.** Finding of master and concurrence of chancellor based upon an error of law is not binding upon appeal.

The concurrence of the master and the chancellor as to the value of land is not binding upon appeal, where it appears that the concurrence is based upon an error of law. (*Post*, p. 410.)

- 10. RAILROADS.** Liable for damages resulting from letting down fences and making wagon ways.

A railroad company is liable to an adjoining landowner for the acts of its construction crews in letting down fences and permitting the entry of stock to destroy crops, and in making wagon ways over the land. (*Post*, p. 411.)

- 11. SAME.** Not liable for injuries to fences by blasting and casting rock against them along acquired right of way, when.

Where, after a rail fence had been injured by blasting operations of a railroad company in constructing its roadbed, the landowner erecting a wire fence in place thereof cannot recover for injuries to the wire fence, for the reason that he was not entitled to recover for injuries by the blasting to the rail fence, because necessarily contemplated by a conveyance of the right of way. (*Post*, p. 412.)

- 12. SAME.** Liability for fence rails used for firewood by construction crews camped upon right of way.

Where a railroad company camped construction crews on the right of way, it was its duty to furnish firewood to enable them to cook their meals; and hence the railroad company will be liable for the acts of the crew in tearing down the fences of adjoining owners and using the rails for firewood. (*Post*, pp. 412, 413.)

FROM HAWKINS.

Appeal from the Chancery Court of Hawkins County.
—JESSE L. ROGERS, Special Chancellor.

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A. T. BOWEN, for complainant.

C. W. MARGRAVES and J. O. PHILIPS, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The controversy in the present case arises on the following facts:

On the 4th day of April, 1906, the complainant conveyed to the railway company a right of way through his tract of land lying in Hawkins county. The consideration expressed in the deed was \$1, but the consideration paid in fact was \$250.

The right of way lay over and through a rocky ledge, which had to be reduced to the necessary level by blasting with powder and dynamite.

As the result of the blasting 7.6 acres of very valuable land, belonging to complainant, lying south of the right of way, between the right of way and the river, were completely covered up with stones from the blast. The amount of the debris was so great that it was worth as much as the land to remove it.

Three acres lying immediately west of the 7.6 acres were covered with stones to such an extent that it would cost \$150 to remove them.

Damages were claimed for injury to other parts of complainant's farm, and also for injury to fencing, to a barn, and to crops, and for the use of certain wagon

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ways worn across parts of the farm over to the right of way.

While the work was in progress the bill was filed, praying for an injunction in case defendants should fail to execute a bond to secure the damages. The bond was executed and filed in the cause, and the work was then resumed.

The chancellor referred the various items of damages claimed to the master, who made a report thereon. Both sides excepted to the report. The chancellor sustained some of the exceptions, and overruled others, and reached the following result:

(1) As to the three acres: He fixed the cost of removing the rock from this land at \$150. To this he added two years' rent, for 1907 and 1908, at \$30 per year, making a total of \$210.

(2) As to the 7.6 acres: He approved the master's valuation of \$200 per acre, aggregating \$1520. On this sum he allowed interest from January 1, 1907, which at the date of the decree amounted to \$216.55.

(3) Damage to upland on the east end of the farm and north of the right of way, by rock cast upon it, and making wagon ways over it, also for destruction of fodder in the same way, all fixed at \$125.

(4) For the destruction of a wire fence he allowed \$20.

(5) For defendant's conduct in making wagon ways through a twenty-five acre field of grass land he allowed as damages \$75.

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(6) For injury to land on the south side of the right of way, and west of the creek, resulting from rock cast upon it and only partially removed, and to wheat crop, and to fodder on the same land, he allowed \$50.

(7) For destruction of a rail fence, \$65.

(8) For injury to a crib by rock thrown against it, and destruction of a small quantity of corn, \$10.

(9) For throwing rock on an island in the river belonging to complainant, and not removing it, \$25.

For the sum which these figures aggregate the chancellor rendered a judgment against both of the defendants, the railway company and McDowell & Co., and the surety on the indemnity bond.

Complainants and defendants all appealed, and assigned errors.

The errors assigned by complainant are as follows:

(1) That the chancellor erred in not fixing the value of the bottom land injured at \$250 per acre, instead of \$200; (2) in not sustaining complainant's second exception to the master's report, which presented the point that the whole 10.6 acres of bottom land (composed of the 7.6 and three acres) were so covered with rock as to be destroyed, or so that it would be worth the value of the land to remove the rock; that, even if the rock could be removed from any part of it, still complainant had lost three years' use of the land, and should have compensation on that basis; (3) in not sustaining complainant's third exception to the report, which made the point that the master failed to

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allow anything for 3.8 acres of upland south of the right of way, destroyed by rock cast, in addition to the bottom land, worth \$10 per acre; (4) because the chancellor failed to sustain complainant's fourth exception to the report, which was in effect that the 10.6 acres of bottom land and 3.8 acres of upland were worth together \$3218; (5) because the chancellor sustained the fourth, fifth, sixth, seventh, eighth, and ninth exceptions of the defendants to the report, which resulted in fixing the sums under numbers 3, 4, 5, 6, 7, and 8, scheduled above from the decree, which were reductions from the sums reported by the master.

The railway company assigned the following errors: (1) That the chancellor erred in fixing the value of the 7.6 acres at \$200; (2) in allowing \$30 per year rent for 1907 and 1908 for the three acres; (3) in allowing interest on the value of the 7.6 acres from January 1, 1907.

Defendants A. S. McDowell & Co. assigned the following errors: (1) That the chancellor erred in rendering any judgment whatever against them; (2) in not adjudging that, if any damages at all were due from them by reason of the blasting of rock, it could only be to the extent of the cost of removal of the rock from the premises; (3) in adjudging anything against them for loss of crops and buildings; (4) in adjudging anything against them for the use of wagon ways through the farm; (5) in allowing complainant \$30 per year, for 1907 and 1908, for the use of the three acres; (6)

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in adjudging damages for fences injured or destroyed in the construction of the railway; (7) in adjudging damages against them for any injury done to the crib and corn by blasting.

Before disposing of these assignments, we shall state the principles that control.

A railroad company has the right to blast rock on its right of way in order to level down its roadbed; but if, in doing so, it casts rocks upon, and so injures, the land of an adjoining owner, whose land has not been condemned, and who has not conveyed or agreed to convey the right of way, the latter has the right to an assessment of damages for the injury done. *Dodge v. County Commissioners*, 3 Metc. (Mass.), 380; *Brown v. Providence, etc., R. Co.*, 5 Gray (Mass.), 35; *Cary v. Morrison*, 129 Fed., 177, 63 C. C. A., 267, 65 L. R. A., 659. That such right to blast would exist, and that the blasting, although prudently done, would probably cause injury to adjoining land, must be held to have been within the contemplation of the parties, where damages were assessed in a condemnation proceeding, and, if not actually covered in such assessment, such injury cannot be sued for and recovered later. The matter is *res adjudicata*. *Sabin v. Vermont, etc., R. R. Co.*, 25 Vt., 363, 370, 371. Such assessment, however, does not cover injuries caused by negligent construction of the road (*Carrier v. Railroad*, 7 Lea, 388; *Railroad v. Hays*, 11 Lea, 389, 47 Am. Rep., 291; *Railroad v. Mossman*, 90 Tenn., 157, 16 S. W., 64, 25 Am. St.

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Rep., 670; *Railroad v. Higdon*, 111 Tenn., 121, 76 S. W., 895); nor injuries inflicted upon a tract other than that out of which the condemned land was taken. An agreement between a landowner and a railroad company to sell the latter a right of way across the tract of the former covers all damages, of whatever sort, to that tract, to which the landowner would have been entitled in a regular condemnation proceeding. He is presumed to have contemplated and arranged for all such damages in fixing the consideration for the contract, and he is therefore remitted to it. *N. & W. Ry. Co. v. Swank*, 105 Pa., 555, 561; *Hannaher v. St. Paul, etc., Co.*, 5 Dak., 1, 14, 37 N. W., 717; *Delaware, etc., Canal Co. v. Lee*, 22 N. J. Law, 243, 250; *Hodge v. Lehigh Val. R. Co.* (C. C.), 39 Fed., 449, 451; *Norris v. Vermont C. R. Co.*, 28 Vt., 99, etc.; *Watts v. Norfolk, etc., R. R.*, 39 W. Va., 196, 19 S. E., 521, 23 L. R. A., 674, 45 Am. St. Rep., 894. For other authorities, see cases cited in 15 Cyc., pp. 800, 801, note 64. Of course, the effect of a deed is the same (2 Lewis on Em. Dom., secs. 293, 568), and the deed covers by implication whatever is necessary to make the enjoyment of the land conveyed effectual, and, where it is conveyed for a particular purpose, then effectual for that purpose (*Chicago, Rock Island & Pac. Ry. Co. v. Smith*, 111 Ill., 363; *Conwell v. S. & N. W. R. R. Co.*, 81 Ill., 232). But while the railroad company is not liable, under the circumstances stated, for casting rock upon the land, its duty is to remove the rock in the shortest time in which

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it can be done, and with the least injury to the land, and it is liable for a breach of this duty. *Sabin v. Vermont Central R. Co.*, supra. Use of the adjoining land for wagon ways in hauling to and from the right of way, in preparation and construction of the same, is not within the appraisal, save the mere right of access, and hence must be paid for, even after such appraisal or conveyance. *Id.* Injury to crops is within the appraisal, as incidental damages. *Paducah & Memphis R. R. Co. v. Stovall*, 12 Heisk., 1; *Vaulx v. Railroad*, 120 Tenn., 316, 329, 330, 108 S. W., 1142. Injury to buildings by blasting falls under the same rule. *Dodge v. County Commissioners*, supra; *Watts v. N. & W. Ry. Co.*, supra. The same must be true as to fences, in so far as they are exposed to blasting operations and may be damaged thereby, since injuries of this kind are probable, and should be anticipated in fixing the price of the land.

Applying these principles as we proceed, and others to which we shall incidentally refer, we are of the opinion that the various assignments of error should be so sustained, disallowed, or modified as to reach the following result:

The first ruling in the chancellor's decree, as above scheduled, touching the three acres, is correct, except as to the rents allowed. There is a concurrence of the master and the chancellor as to the cost of removing the rock from this land, as fixed by the chancellor, and there is evidence to sustain it. This closes the contro-

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versy on that point. The allowance of rents proceeds upon a different and incorrect theory. The defendants are liable, not as for a taking of the three acres, but only for the cost of removal of the rock. On this sum, \$150, they should pay interest from January 1, 1907, which we fix as a reasonable date for completion of removal.

The second ruling in the decree scheduled, as to the 7.6 acres, must be modified. According to the weight of the evidence the value of this land was \$100 per acre, and a reduction must be made to that sum. It is true the master and the chancellor concurred on this valuation of \$200 per acre; but the concurrence is not binding, because it clearly appears from the record that the chancellor's agreement with the master was based upon an error of law. *Turley v. Turley*, 85 Tenn., 251, 256, 1 S. W., 891. The error was in assuming that the value of the land was to be charged as in case of a taking under the law of eminent domain. We have seen that no such charge is to be made for casting rock upon the adjoining land of a landowner who has conveyed the right of way to the railroad company. The charge is for failure to remove the rock within a reasonable time, and is measured by the cost of removal. The witnesses say the cost of removal would equal the value of the land. So evidence was taken to prove the value of the land only for the purpose of fixing by it the cost of the removal of the rock. The value contemplated from this standpoint would be the market value, which

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was \$100 per acre. The complainant had several witnesses, who fixed the value on the theory that complainant owned a large body of upland, and that this bottom land added value to the whole farm, as a very important constituent of the whole tract, being very fertile, by far the most fertile land on the farm. From this point of view they said it would be worth \$200 per acre. This was an erroneous method of estimating its value for the purpose indicated. They agreed that, viewed as a separate parcel or lot of land, it would be worth only \$100 per acre. This was the correct viewpoint.

As to this part of the decree it is insisted by complainant that the rock covered the whole of the three acres, as well as the 7.6 acres, and that the cost of removal should be based on the value of the whole 10.6. This point is closed by the concurrence of the master and the chancellor, and evidence sustaining it.

We think the chancellor acted correctly in allowing interest from January 1, 1907.

The chancellor erred in reducing the third item from \$175 to \$125. The evidence shows the former as the correct valuation. It should be stated that what is referred to as fodder in the items we are now considering was standing corn, which was destroyed, not by blasting, but by the defendants letting down the fences and permitting the stock to destroy the product. One hundred dollars was assessed for this injury by the witnesses, and \$75 for making the wagon ways on the part of the farm indicated.

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The fourth item of the decree, concerning the wire fence, is reversed, and nothing is allowed under that head. This wire fence was erected during the period of construction of the roadbed by blasting, and after a rail fence at the same place had been injured by the blast. This wire fence simply took the place of the rail fence, as to danger to be apprehended from the blasting operations. No recovery could be had for the battering of the rail fence with fragments of rock from the blast, because this was an injury necessarily contemplated when the deed conveying the right of way was made, under the authorities above cited.

As to the fifth item, the chancellor's decree, as scheduled, should be modified by raising the sum therein mentioned from \$75 to \$150, the sum allowed by the master and shown by the evidence.

As to the sixth item, likewise, the chancellor's decree should be modified by raising the allowance from \$50 to \$100, the amount allowed by the master. The crops upon this part of the land were not destroyed by the blasting, but by reason of defendants' servants tearing down the fence and using it for firewood, thus exposing the crops to marauding cattle. A portion of this allowance (\$12.50) is for the cost of removing rock from the portion of the land referred to; the remainder for destruction of the crops in the manner stated.

As to the seventh item, we think the decree should be modified, so as to raise the sum to be allowed for the rail fence from \$65 to \$100. This is the sum shown

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by the evidence, and allowed by the master. No claim is made for injury to the rail fence in question by blasting, and nothing is allowed on that head; but the liability is placed on the ground that defendants' laborers tore the fence down and used the rails for stove wood to cook their meals. The defendants insist they are not liable for such acts of their laborers. We think they are. It was their duty to furnish firewood. They had these laborers camped on the work.

The eighth item of the decree is reversed, on grounds already stated.

The ninth item of the decree is affirmed.

The complainant's third assignment of error is sustained, concerning the failure to make an allowance for the 3.8 acres of upland south of the right of way, fully covered by rock from the blast and not removed. For this \$38 should be added to the decree.

We do not find there was any negligence in conducting the work of blasting. There is some evidence indicating negligence; but this is fully and satisfactorily explained in the evidence of Mr. McDowell, and no expert testifies that the amounts of powder and dynamite used in any given blast or blasts were excessive, considering the very difficult nature of the material the defendants had to deal with.

It is not necessary that we should attempt to apportion the liability between the railway company and the contractors. They have agreed upon this matter between themselves. The whole amount will be adjudged

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in favor of complainant against both of them; also on the indemnity bond.

The costs of the appeal will be equally divided. The costs of the court below will be paid as decreed by the chancellor.

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JEFFERSON BANK OF ST. LOUIS v. CHAPMAN-WHITE-
LYONS COMPANY.

(Knoxville. September Term, 1909.)

1. **CORPORATIONS.** Vice president may execute note in name of corporation empowered to issue notes.

Where the charter of a corporation authorizes it to issue notes, and the by-laws authorize the president to sign contracts, and only require the attestation of the secretary to such documents as required the corporate seal, and further authorize the vice president to perform the duties of the president in the absence or disability of the president; and where the president of the company resides in another county, and the actual management of the business is generally left to the vice president, he (the vice president) has the right, under the said charter and by-laws, to execute a note in the name of the company. (*Post*, pp. 418-420, 424, 425, 429-431.)

Case cited and distinguished: *Roach v. Woodall*, 91 Tenn., 213.

2. **BILLS AND NOTES.** Bona fide purchaser's title will not be defeated by merely suspicious circumstances.

Where the plaintiff (a bank) purchased the note of a corporation, in due course, for value, before maturity, without actual notice of any infirmity or defect, the fact that the plaintiff's cashier, at the time he discounted the note, knew that the payee of the note was a manufacturer of stoves in one city, and that the maker was engaged in the wholesale drug business in another city, would not be sufficient to give plaintiff knowledge of any defect in the title to the note, or raise an implication of bad faith in purchasing it, as the title of the purchaser will not be defeated where he receives the note under merely suspicious circumstances. (*Post*, pp. 420-422.)

Acts cited and construed: Acts 1899, ch. 94, secs. 56 and 57.

Case cited and approved: *Bank v. Butler*, 113 Tenn., 574.

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- 3. SAME.** A corporation's note for stock in another corporation is *ultra vires* and not collectible by the payee.

A note given by a corporation for the purchase of stock in another corporation is *ultra vires*, and against public policy, and is not collectible by the payee of the note. (*Post*, pp. 422-424.)

Cases cited and approved: Elevator Co. v. Railroad, 85 Tenn., 703; Mallory v. Oil Works, 86 Tenn., 598; Marble Co. v. Harvey, 92 Tenn., 119; Miller v. Insurance Co., 92 Tenn., 167, 168, 175; Cullen v. Coal Creek, etc., Co., 42 S. W., 693.

Cases cited and distinguished: McGrew v. Exchange, 85 Tenn., 572; Snoddy v. Bank, 88 Tenn., 576.

- 4. SAME.** Corporation's negotiable note for an *ultra vires* purpose and against public policy is not void in the hands of an innocent purchaser before maturity.

Where a corporation is authorized to execute notes, a negotiable note executed and issued by it for an *ultra vires* purpose is not void in the hands of an innocent purchaser for value before its maturity, even though the purpose for which the note was executed was in violation of the public policy of the State. (*Post*, pp. 424-429.)

See cases cited and approved under the preceding headnote.

- 5. SAME.** Bona fide purchaser of stolen negotiable instruments will be protected.

Where negotiable securities are stolen and sold by the thief to an innocent purchaser, the title of the innocent holder will be protected. (*Post*, p. 429.)

Case cited and approved: Memphis Bethel v. Bank, 101 Tenn., 134.

- 6. SAME.** Bona fide purchaser and holder of a negotiable note may recover full amount.

The *bona fide* purchaser and holder of a negotiable note in due course may enforce payment of the full amount thereof, and is not limited to the amount paid for the note, with interest thereon, although the note may be without consideration and invalid as between the maker and payee. (*Post*, p. 431, 432.)

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Acts cited and construed: Acts 1899, ch. 94, sec. 57.

Case cited and distinguished: Oppenheimer v. Bank, 97 Tenn., 19;
Campbell v. Brown, 100 Tenn., 245.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOHN H. FRANTZ, Special Chancellor.

WEBB, MCCLUNG & BAKER, for complainant.

SHIELDS, CATES & MOUNTCASTLE, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the
Court.

Complainant brings this bill to recover the amount of a note of \$2500, executed by the defendant to the Hagey Stove Company, and by the latter assigned to the Jefferson Bank of St. Louis. It is alleged in the original bill that the complainant bank purchased this note from the Hagey Stove Company in due course of trade, for value, and before its maturity, and complainant claims that it is an innocent holder and owner of said note. Chapman-White-Lyons Company in its answer admits the execution of the note, but under oath denies that said note is its act or deed, and also denies

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that complainant is an innocent holder of said note. The averments upon which the defendant denies that it is liable on said note are that D. C. Chapman, its vice president and general manager, executed said note in the name of defendant firm in payment of stock for \$5000, which the said Chapman purchased in the Tennessee Star Vending Match Company, a Tennessee corporation, engaged in manufacturing and renting a patented match-vending machine. The note for \$2500 in suit was executed to the Hagey Stove Company in part payment for said stock. It is averred that said note was executed by defendant's vice president and general manager, without authority from defendant or its stockholders or board of directors; that said note was procured from Chapman by fraud; and that it is utterly without consideration. It is further averred that the act of Chapman in executing said note was wholly without authority from the defendant firm, and that the execution of said note was *ultra vires* and void as to this defendant. Wherefore defendant company denies any liability whatever on said note.

Proof was taken, and on the hearing the special chancellor, Hon. Jno. H. Frantz, pronounced a decree in favor of complainant for the full value of the note, with interest and attorney's fees, as stipulated on the face of the note. The defendant, Chapman-White-Lyons Company, appealed and has assigned errors as follows:

(1) The chancellor erred in finding and decreeing that complainant, Jefferson Bank of St. Louis, Mo.,

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is an innocent purchaser of said note, and that the pleas of *non est factum* and *ultra vires* contained in the sworn answer of defendant, Chapman-White-Lyons Company, are unavailing against said note in the hands of the bank.

(4) The chancellor erred in holding and decreeing that the complainant is entitled to recover from the defendant, Chapman-White-Lyons Company, the full face of said note, with ten per cent. attorney's fees, for the reason that, conceding complainant to be an innocent purchaser of the note, and that the defenses interposed thereto are unavailing, even an innocent purchaser of commercial paper can only recover the actual amount paid out by him, with interest, when it appears that the maker of the note has a valid defense as against the payee.

In examining this question the first inquiry that arises is in respect of the power of the defendant corporation to execute the note in question.

The provisions of the charter of the Chapman-White-Lyons Company, conferring on it power to issue negotiable paper, are as follows:

"(7) To borrow money and issue notes or bonds upon the faith of the corporate property," etc. It is also authorized "to deal in merchandise in as full and ample a manner as is now allowed by law to individuals."

Article 4 of section 1 of the by-laws authorizes the president to sign contracts for the company, and only

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requires the attestation of the secretary to such documents as require the corporate seal, and then only when necessary.

Section 2 of article 4 provides that the vice president and general manager shall perform the duties of the president "in the absence or disability of the president."

Now, it will be observed that under its act of incorporation the defendant, Chapman-White-Lyons Company, is expressly authorized to issue notes or bonds, and in the present instance the note was executed by the vice president of the company, who, under its by-laws, is vested with the authority of the president, in the absence or disability of the president. The president was expressly authorized by the by-laws to sign the contracts of the company, and this duty could, of course, be performed by the vice president in the absence or disability of the president. The record discloses that the president of the company resided in another county and the actual management of the business was generally left to the vice president. We take it the vice president had the right, under the charter and by-laws, to execute the note in controversy; and, nothing appearing on the face of the note to impair its negotiability *prima facie*, it is binding in the hands of an innocent purchaser for value and without notice of any infirmity in the note.

It is said, however, on behalf of the defendant, Chapman-White-Lyons Company, that the note is without

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consideration, since neither the company, nor any officer of the company, ever received any part of the stock in the Tennessee Star Vending Match Company, for which the note in question was executed. It appears, however, from the testimony of the cashier of the Jefferson Bank, who purchased this note from Robinson, the representative of the Hagey Stove Company, that he discounted the note in due course of trade, and had no notice of any of the facts attending the execution of the note, and no knowledge that the note was without consideration. He testifies that the proceeds of the note were placed to the credit of the Hagey Stove Company and checked out by that corporation.

It is provided by the negotiable instruments law of this State (Laws 1899, p. 150, c. 94), passed May 16, 1899, in section 57, as follows:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Section 56: "To constitute notice of an infirmity in an instrument or defect in title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

There is no proof in this record tending to show that the Jefferson Bank had actual notice of any outstand-

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ing equity against the note, or any knowledge of such facts as would imply bad faith in purchasing the note. The fact that the cashier of the bank, at the time he discounted the note, may have known that the Hagey Stove Company was engaged in the manufacture of stoves in St. Louis and that the Chapman-White-Lyons Company was a corporation engaged in the wholesale drug business in Knoxville, would not be sufficient, under our statute, to fix the bank with knowledge of any defect in the note, or raise an implication of bad faith in purchasing it. The title of the purchaser. it has been held, will not be defeated, where he receives the note under merely suspicious circumstances. *Unaka National Bank v. Butler*, 113 Tenn., 574, 83 S. W., 655.

It is said, however, on behalf of the appellant, that in Tennessee a commercial corporation is inhibited against purchasing or owning stock in another corporation, and that the purchase of such stock is *ultra vires* and against the public policy of the State. *Marble Co. v. Harvey*, 92 Tenn., 119, 20 S. W., 427, 18 L. R. A., 252, 36 Am. St. Rep., 71; *Cullen v. Coal Creek M. & F. Co.*, 42 S. W., 693; *Elevator Co. v. Railroad*, 85 Tenn., 703, 5 S. W., 52, 4 Am. St. Rep., 798; *Mallory v. Oil Works*, 86 Tenn., 598, 8 S. W., 396; *Miller v. Ins. Co.*, 92 Tenn., 175, 21 S. W., 39, 20 L. R. A., 765.

In *Marble Co. v. Harvey*, 92 Tenn., 119, 20 S. W., 428, 18 L. R. A., 252, 36 Am. St. Rep., 71, it is said as follows:

“The public policy of this State will not permit the

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control of one corporation by another. . . The result is that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it, enforceable by or through the courts of the State, when such aid is invoked in furtherance of the unlawful agreement."

"Contracts of corporations, made in excess of their charter powers, are *ultra vires* and void. Such contracts are in contravention of public policy, and corporations are not estopped, although the contract has been executed in good faith by the other party, to make the defense of *ultra vires* to any suit brought to enforce such unauthorized contract." *Miller v. Insurance Co.*, 92 Tenn., 167, 168, 21 S. W., 39, 20 L. R. A., 765.

The insistence on behalf of appellant is that the note in controversy was executed for an unlawful purpose, namely, the purchase by one corporation of stock in another corporation, in contravention of the public policy of this State, and that the note is not merely voidable, but absolutely void. Counsel cite *Snoddy v. Bank*, 88 Tenn., 576, 13 S. W., 127, 7 L. R. A., 705, 17 Am. St. Rep., 918, wherein it appeared that J. H. Snoddy executed a note negotiable in form to Williams & Co. for a gambling contract. Williams & Co. transferred the note to the American National Bank in due course of trade and before maturity. The bank

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purchased the note without any knowledge of the consideration that passed between the original parties. The bank, as an innocent purchaser for value, sought to collect the note by suit against Snoddy. It was held by this court that the note was void and noncollectible, because based on a gambling transaction. The court said:

“By the great weight of authority notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands.”

It will be observed, from an examination of that case, that the note was held void, because based on a gambling consideration, and was void by express statute. Acts 1883, p. 331, c. 251; *McGrew v. City Produce Exchange*, 85 Tenn., 572, 4 S. W., 38, 4 Am. St. Rep., 771.

We are clearly of opinion that under the authorities, as between the drawer and drawee of the note, it was *ultra vires* and noncollectible; but a different question is presented when the note is found in the hands of an innocent purchaser before maturity in due course of trade. If the Chapman-White-Lyons Company, a corporation, had been entirely destitute of any authority to execute negotiable paper under its charter, then such paper would be void, even in the hands of an innocent purchaser for value; but, where it appears that the charter of a corporation confers express power to make bills and notes in the course of its business, the fact that it transcended the power conferred in its char-

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ter and executed a negotiable instrument for a matter beyond the scope of its business would not destroy the negotiability of the note and render it void in the hands of an innocent purchaser for value. The authorities announcing this rule have been collected by Mr. Thompson in his work on Corporations, and the rule is well formulated by the author in the following paragraphs of said work:

"The general rule established by the American cases is that private corporations, unless prohibited by charter or by statute, have the implied power to execute promissory notes or other evidences of indebtedness in payment or settlement of all debts incurred in the course of the execution of their corporate purposes, or in connection with any matter which they are authorized by their charter or by the governing statute to do, and which is not foreign to the purposes of their creation. This includes the power to execute promissory notes payable on demand or at a future date, to draw bills of exchange, to accept drafts, and to draw checks upon any funds deposited in bank." Thompson on Corporations (2d Ed.), sec. 2185.

"The power to execute negotiable instruments is based on the implied power inherent in every corporation of making and taking contracts to effectuate any of the purposes of its creation." Id., sec. 2186.

Again the author says:

"When a corporation possesses general powers to issue commercial paper, what is termed an *ultra vires*

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negotiable instrument is good in the hands of a *bona fide* purchaser for value. But corporations possess no implied power to execute or indorse negotiable paper for purposes foreign to the objects of the corporation. This principle was illustrated in an early United States case, where it was held that a railroad company had no power to execute a promissory note for the purchase price of a steamboat."

Again the same author says, in section 2190:

"The distinction must be observed between total want of power in a corporation to issue negotiable instruments and irregularities in the exercise of the power in the execution of such instruments. Where there is an entire want of power on the part of the corporation to execute a negotiable instrument, there can be no recovery on the part of the holder, although he may be *bona fide* such, unless the corporation has estopped itself from maintaining such defense. . . . On the other hand, where a corporation possessing general power to issue negotiable instruments did issue its negotiable paper, unauthorized in the particular instance, but such want of authority did not appear on the face of the instrument, the court held that the corporation was liable to an innocent holder for value, speaking as follows: 'To state the legal proposition in its application to this case, this defendant, having power to incur debts to a limited extent, and to issue its negotiable notes therefor, the plaintiff, as a *bona fide* holder of the note in suit, may recover upon it, although in this par-

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ticular case the indebtedness of the corporation at the time of giving this note already exceeded the limits prescribed by its articles of association.' This distinction between the want of power and its irregular exercise is recognized by the courts generally."

Again the same author says:

"Where corporations have the power to issue negotiable paper, such instrument will be presumed to have been given for the authorized purposes of the corporation, and in the ordinary course of business, until the contrary is made to appear; and the burden is upon the person who alleges the contrary to prove it. . . . So it has been held that this presumption does not prevail where it appears that the instrument was issued contrary to the purposes for which the corporation was created, and no circumstances are shown by the party affirming the validity of the act, sufficient to make the act valid. But the better rule, according to the American authorities, is that nothing but a total want of power will impeach such instrument in the hands of *bona fide* purchasers for value. Under this rule, if an instrument was made in the course of business, and for its benefit, the corporation will be bound, though the note may have been indorsed for a purpose apparently beyond the scope of its business."

In 2 Cook on Corporations, par. 761, note 4, citing *Genesee Savings Bank v. Michigan Barge Co.*, 52 Mich., 438-446, 17 N. W., 790, 18 N. W., 206 (1884), the rule is thus stated:

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“Where a corporation has, under any circumstances, power to issue negotiable paper, the *bona fide* holder has the right to presume that it was issued under circumstances which gave the requisite authority; and the negotiable paper of a corporation, which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder.”

In Field on Corporations, sec. 270, it is said:

“If the corporation has authority to issue these instruments for any purpose, although in respect to the particular issues it may have been in excess of authority, the purchaser would be protected, if he made the purchase in good faith, for a valuable consideration, and without notice, actual or constructive, of the particular infirmity or excess of authority on the part of the corporation or its agents.”

Id.: “If there is nothing on the face of the negotiable instruments executed by a corporation to indicate that they are *ultra vires*, and it had power to issue such instruments (notes) in the conduct of its legitimate business, a defense on that ground could not be set up to defeat a recovery thereon by a *bona fide* holder for value without notice of the excess of authority in issuing them for the particular purpose for which they were issued.”

In Tiedeman on Bills and Notes, par. 43, it is said:

“Indeed, it is the general rule that while, between the original parties to the paper, a corporation can

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defend in a suit on its bills, notes, and checks by pleading that its issue was *ultra vires*, this defense will not prevail against a *bona fide* holder; the common rule of negotiable paper applying, that the indorsee takes the paper free from the equitable defenses that taint the character of the paper, while it is still in the hands of the original payee."

It is said, however, by counsel for appellants, that the note in suit, having been executed in violation of the public policy of this State, is absolutely void, even in the hands of an innocent purchaser; but we are of opinion that the authorities cited establish the proposition that, where the corporation is clothed with authority to issue negotiable instruments, an irregular exercise of the power, or the issuance of the paper for an object foreign to the business of the corporation and against the public policy of the State, does not affect the validity and collectibility of the note in the hands of an innocent purchaser.

It is well settled that, where negotiable securities are stolen and sold by the thief to an innocent purchaser, the title of the innocent holder will be protected. *Memphis Bethel v. Bank*, 101 Tenn., 134, 45 S. W., 1072.

Counsel also invokes the doctrine applicable to infants and insane persons, namely, that notes executed by them are absolutely void, even in the hands of an innocent purchaser.

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The case of *Roach v. Woodall*, 91 Tenn., 213, 18 S. W., 407, 30 Am. St. Rep., 883, is cited for the proposition that a note executed by a minor is absolutely void, even in the hands of an innocent purchaser; but it must be remembered that an infant has no power to execute a promissory note under any circumstances, even for necessities, while in the present case the defendant corporation is expressly authorized by its charter to issue notes or bonds.

Counsel also cite the following from Daniel on Negotiable Paper (3d Ed.), vol. 1, p. 352, sec. 377, as follows:

"It is obvious that inquiry as to the power of the corporation to execute the instrument is of the first importance; for, if it exceed its powers, its act is as much a nullity as the act of a married woman or a lunatic, and, however ignorant and innocent the party dealing with it may have been, he cannot enforce his contract made with it.

"It is considered as an act '*ultra vires*'—that is, 'beyond the powers'—of the corporation, and therefore without legal sanction or vitality. And, being a mere nullity, circulation from hand to hand, and ownership by a *bona fide* holder, can impart no vitality to it; and as against the corporation he can stand on no better footing than his predecessors. Nor is this rule so harsh as it might seem. Ignorance of the law excuses no one, and, a corporation being a legal creation, all persons dealing with it are chargeable with notice of its legal character."

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But the same observations are pertinent to this statement of the law, namely, married women are not authorized to issue negotiable paper under any circumstances, unless expressly provided by the statute; whereas, as already stated, the defendant corporation is clothed with such general power.

It is said, however, by counsel for appellant, that in no event is the complainant entitled to recover exceeding the amount it paid for said note, with interest. It appears that the decree below was for the full amount of the note, with interest and attorney's fees amounting to \$251.75. Counsel, in support of his position, invokes the principle announced in *Oppenheimer v. Bank*, 97 Tenn., 19, 36 S. W., 705, 33 L. R. A., 767, 56 Am. St. Rep., 778, wherein it was said:

"We hold, however, that, these notes being fraudulent in their inception and without consideration between the original parties, the bank will only be entitled to recover to the extent of the sum actually paid by it, to wit, the sum of \$1200 and interest. In other words, we hold there was a negotiation of the notes in due course of trade only to the extent of the amount actually paid."

Again, in *Campbell v. Brown*, 100 Tenn., 245, 48 S. W., 970, it is said:

"The purchaser of a note at a rate of discount equivalent to forty per cent per annum cannot, though innocent of any wrong, recover more than the amount actually paid against the maker in fraud of whose rights the note was transferred."

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It should have been stated that the amount paid for the note by the complainant was the sum of \$2448.75, so that the amount of discount retained by the bank was \$51.25. But we are of opinion that this question is now settled by section 57 of the negotiable instruments law, which provides that the innocent holder "may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

The decree of the chancellor will therefore be affirmed.

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JAMES M. LAY v. M. L. LINKE.

(*Knoxville*. September Term, 1909.)

LIBEL AND SLANDER. Evidence required to sustain plea of justification in an action of slander for alleged false charge of perjury.

To sustain the defendant's plea of justification in an action for slander, predicated upon an alleged false accusation of perjury made by the defendant against the plaintiff, the defendant must prove the charge by two witnesses, or by one witness and strong corroborating circumstances, because the plaintiff testified under oath when making the statement charged to be false, and this cannot be overcome by the oath of a single witness; but a preponderance of the evidence suffices, as in other civil cases, and the accusation need not be proved beyond a reasonable doubt, as is required in criminal cases.

Cases cited and distinguished: *Coulter v. Stuart*, 2 Yerg., 225, 226; *McLarin v. State*, 4 Humph., 381; *Chapman v. McAdams*, 1 Lea, 505; *Hill v. Goodyear*, 4 Lea, 233; *McBee v. Bowman*, 87 Tenn., 141; *Fleming v. Wallace*, 116 Tenn., 20.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell County to the Court of Civil Appeals, and writ of *certiorari* from the Court of Civil Appeals to the Supreme Court.—G. Mc. HENDERSON, Judge.

Lay v. Linke.

JOHN JENNINGS, JR., for plaintiff.

J. C. J. WILLIAMS, for defendant.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is an action of slander brought by James M. Lay against M. L. Linke, predicated upon an alleged false accusation of perjury made by the defendant against the plaintiff. The pleas were not guilty and justification. The presiding judge instructed the jury, substantially, that the defendant to sustain his plea of justification must produce evidence sufficient to convict the plaintiff of the crime of perjury; that he must prove the truth of the accusation beyond a reasonable doubt.

The verdict and judgment were for the plaintiff. The court of civil appeals held that the instruction of the trial judge was erroneous, and this action is here assigned as error.

The instruction given by the trial judge was doubtless based upon the opinion of the court in *Coulter v. Stuart*, 2 Yerg., 225, and referred to in the subsequent cases of *Chapman v. McAdams*, 1 Lea, 505; *Hill v. Goodyear*, 4 Lea, 233, 40 Am. Rep., 5; *McBee v. Bowman*, 89 Tenn., 141, 14 S. W., 481, and *Fleming v. Wallace*, 116 Tenn., 20, 91 S. W., 47.

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These cases, while the first may be said to be misleading upon this subject, when rightly considered, do not so hold.

The case presented in *Coulter v. Stuart*, is there stated in these words:

"The court on the trial was called upon to instruct the jury that, this being a civil action, one witness was sufficient to sustain the plea of justification. The court refused so to charge, but instructed the jury that, as this plea imputed the crime of perjury to the plaintiff, the defendant was bound to sustain himself by the oath of two witnesses, or one witness and strong corroborating circumstances."

This was before parties were competent to testify in their own behalf.

Judge Peck, delivering the opinion of the court, holding that this was not error, said:

"To prove [perjury] or fix the charge [perjury] upon the plaintiff in a civil case should require the same *quantum* of proof which would be required to convict him upon a criminal prosecution. The record evidence of a suit, with the averment of an oath having been taken falsely in that suit, is as much before the jury in the civil action as on the indictment; so is the fact of oath against oath, and therefore the rule of evidence to bring out the fact of perjury must be the same in both cases."

This last statement was *dictum*. The trial judge had not so charged the jury; the instructions being that,

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since the plea of justification imputed a crime of perjury to the plaintiff, the defendant was bound to sustain himself by the oath of two witnesses, or one witness and strong corroborating circumstances. This was correct, and is unquestionably the rule now in this State. It is, however, far from an instruction that the proof necessary to sustain a plea of justification must be sufficient to convict the plaintiff of perjury, or to show that the testimony given by him was false beyond a reasonable doubt.

McBee v. Bowman, supra, was an action of *devisavit vel non*, in which it was contended that the will in question was forged. The trial judge instructed the jury, in substance, that the forgery, since it imputed a felony, must be established beyond a reasonable doubt. It was held that this was error, and, although the charge imputed a crime, a preponderance of evidence, as in other civil actions, would prevail. The only reference to *Coulter v. Stuart* is in these words:

"One exception to the general rule was recognized by this court in the case of *Coulter v. Stuart*, 2 Yerg., 226, as early as 1828. In that case it was decided, on good authority, that a plea justifying a charge of perjury in a civil action for slander must be sustained by the same *quantum* of proof as would be required to convict in a criminal prosecution. We do not deny the soundness of that holding. That question is not before us. This case does not fall within that exception. We do not think another exception should be

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made, or that the one already established should be extended to embrace a case like this one."

Fleming v. Wallace, supra, was an action for slander for falsely charging the defendant with cutting a corner tree of the plaintiff, and it was held that a plea of justification, although the charge was of felony, would be sustained by a preponderance of the evidence. It is there said:

"A careful examination of the opinion in *Coulter v. Stuart*, supra, will show the court did not hold that, in an action of slander imputing any crime to the plaintiff, the plea of justification should be established beyond a reasonable doubt; but it simply held that, in an action of slander imputing to the plaintiff the crime of perjury, the same *quantum* of proof is necessary which would be required to convict him upon a criminal prosecution. In that case the trial judge charged that the defendant was bound to sustain his plea of justification by the oath of two witnesses, or one witness and strong corroborating circumstances. And this court held the instruction was proper. The reason of the rule was that the oath of the plaintiff in which perjury is ascribed to him could not be overcome by the oath of a single witness.

"It was held by this court in *McLarin v. State* [4 Humph.], 23 Tenn., 381, that upon an indictment for perjury the testimony of a single witness is sufficient to convict. Moreover, the rule is well settled that in an indictment for perjury the defendant's guilt must be

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established beyond a reasonable doubt. Elliott on Evidence, vol. 4, sec. 3071.

"The case of *Coulter v. Stuart* is exceptional, and the rule therein announced must be limited to an action for slander wherein it appears the defendant imputed to the plaintiff the crime of perjury and files a plea of justification; but this rule has not been applied, so far as we are advised, by any reported decision of this court to actions of slander imputing other crimes than that of perjury. The authority of that case must, therefore, be limited to its precise facts, and is not controlling in the present instance."

While these cases have thrown some doubt upon the question, we think the original case has been misunderstood, and that the sound rule, supported by principle and the weight of authority is that a preponderance of evidence is all that is necessary to sustain a plea of justification in an action of this character.

Mr. Wigmore in his work on Evidence (volume 4, sec. 2498), says:

"But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for criminal cases should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempts to employ it in any civil case. Nevertheless an effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. It is sometimes said that, in general, where

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in a civil case a criminal act is charged as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated."

In Newell on Slander and Defamation, p. 746, it is said:

"Where perjury is charged, the evidence of two witnesses, or one witness and corroborating circumstances, is necessary to sustain a plea of justification; but the requisite being adduced, however it may conflict with other testimony, as in any other civil case, the jury must weigh it, and will be warranted in finding a verdict in support of the plea, although they may not be satisfied of the truth beyond a reasonable doubt."

It is true, from the very nature of the action and the plea, that to sustain the latter the defendant must prove the charge by two witnesses, or one witness and strong corroborating circumstances, since the plaintiff testified under oath when making the statement charged to be false, and this cannot be overcome by the oath of a single witness. This particular proof is therefore necessary to sustain a plea of justification imputing perjury; but, upon the whole evidence offered by both sides, the issue must be found for the party in whose favor the evidence preponderates, as other issues in civil actions.

The judgment of the court of civil appeals is affirmed, and the case remanded for a new trial.

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DAN MORIARTY v. STATE.¹

(Knoxville. September Term, 1909.)

1. **INTOXICATING LIQUORS.** A bona fide fraternal lodge furnishing its members liquors at cost is not engaged in sales thereof so as to be subject to tax, when.

Where a *bona fide* incorporated lodge as a subordinate lodge of a fraternal benevolent and social organization, as that of the Elks, maintains a building for the convenience and comfort of its members, with the appurtenances of a social club; and in its buffet furnishes its members, but no one else, refreshments, including intoxicating liquors, as a purely incidental matter, for the cost thereof, with that of "service" added, without any profit, such lodge is not engaged in handling intoxicating liquors for sale within the sense of the revenue law (Acts 1907, ch. 541), imposing a tax upon every person, social club, etc., selling intoxicating liquors.

Acts cited and construed: Acts 1907, ch. 541.

Case cited and approved: Club v. Dwyer, 11 Lea, 452.

Case cited and distinguished: Club v. Shelton, 104 Tenn., 101.

Cases pro and con in other jurisdictions cited in the opinion, pages 444, 445.

2. **SAME.** Same. Servant of lodge is not guilty of misdemeanor as for selling, when the lodge is not guilty.

The servant of such lodge, engaged in doing the service of furnishing liquor to the members, as shown in the preceding head-

¹As to applicability of liquor laws to social club dispensing liquors to members, see notes to South Shore Country Club v. People (Ill.), 12 L. R. A. (N. S.), 519; Cuzner v. California Club (Cal.), 20 L. R. A. (N. S.), 1095, and Manning v. Canon City (Colo.), 23 L. R. A. (N. S.), 192.

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note, is not engaged in selling or aiding in the sale of liquors in violation of Acts 1899, ch. 161, sec. 1, and is, therefore, not guilty of a misdemeanor in so serving. (*Post*, pp. 442, 443, 453.)

Acts cited and construed: Acts 1899, ch. 161, sec. 1; Acts 1907, ch. 541.

3. SAME. Clubs for illegal sale of liquor will be held amenable to the law.

Where a club is chartered and organized to evade, if possible, under the forms of law, the statutes prohibiting the sale of intoxicating liquors, and to furnish intoxicating liquors to its members as the principal purpose or one of the chief objects of its organization, and not as a mere incident, or to sell the same for a profit, the disguise should and will be uncovered, and the club and its members made amenable to the law so violated. (*Post*, pp. 445, 453, 454.)

FROM KNOX.

Appeal in error from the Criminal Court of Knox County.—T. A. R. NELSON, Judge.

J. K. GREEN, J. W. CULTON, S. G. HEISKELL, and J. C. HARRIS, for Moriarty.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The plaintiff in error, upon an indictment charging him with unlawfully selling intoxicating liquors with-

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out license, was convicted, and a fine of \$100 was assessed against him, and it was adjudged that, in addition, he be confined in the county workhouse for six months.

The facts on which this conviction was made are, briefly, as follows: The Benevolent and Protective Order of Elks of the United States of America is a fraternal benevolent and social organization, with about 1100 subordinate lodges, consisting of near 400,000 members, located in the different parts of the United States. One of these lodges is known as the Knoxville Lodge of Elks, No. 160. This lodge is incorporated under the laws of Tennessee, with its *situs* in the city of Knoxville, in this State, and has a membership of several hundred. It also has a large building in the city of Knoxville, fitted up for the convenience and comfort of its members, and having all the appurtenances of a social club. Within this building and a part thereof is a small room equipped and used as a buffet, where members of the lodge, and no one else, could obtain refreshments, including intoxicating liquors. All the supplies used in this buffet were furnished by and were the property of the lodge. The trustees of the lodge employed the plaintiff in error as steward, whose duty it was, among other things, in the operation of this buffet to serve the members, upon the presentation of printed checks, theretofore purchased by them from the lodge, intoxicating liquors. These checks had stamped upon them: "Good for service only,

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and not transferable." Each of these checks represented the price of one drink, and this price, fixed by the lodge, was the equivalent only of the cost of the drink, with that of "service" added. The furnishing of a drink to one of the members of the lodge by plaintiff in error in exchange for one of these checks is the basis of this indictment and conviction.

It is proper to say that there is no claim on this record that this lodge is not organized under the statute as a *bona fide* one for social and benevolent purposes, or that its charter was obtained as a cloak or device to serve its incorporators and members in the sale and purchase of intoxicants, in evasion of the law prohibiting such sales without license. Upon these facts, the question is: Was plaintiff in error guilty of the offense charged?

Within the last few years many cases of a similar character to the present have reached a number of the courts of last resort in this country, and it will be found upon examination that the opinions of these courts on the question involved are irreconcilable. Thus it has been held in one class of these cases that a *bona fide* social club, organized for the purpose of establishing a library in connection with the clubrooms for social enjoyment, may serve its members and their invited guests with intoxicating liquors, the members only paying therefor, the money so received being used to replenish the stock, but insufficient for that purpose, without being liable to pay license required from re-

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tail liquor dealers. *State v. Austin Club*, 89 Tex., 20, 33 S. W., 113, 30 L. R. A., 500; *Piedmont Club v. Com.*, 87 Va., 540, 12 S. E., 963.

There is still another class in which it has been held that the dispensing of intoxicants to its members by a *bona fide* social club, where the liquors are held in common, is not a sale of liquors within the meaning of the license laws. *State, ex rel. Bell, v. St. Louis Club*, 125 Mo., 308, 28 S. W., 604, 26 L. R. A., 573; *State, ex rel. Columbia Club, v. McMaster*, 35 S. C., 1, 14 S. E., 290, 28 Am. St. Rep., 826.

In *Barden v. Montana Club*, 10 Mont., 330, 25 Pac., 1042, 11 L. R. A., 593, 24 Am. St. Rep., 27, it was held that a social club, by reason of keeping a bar and furnishing liquor to its members are invited guests, where such liquor was not sold for a profit, and the club was not a device for evading the laws as to the sale of such liquors, was not subject to the license tax imposed by the statute on "all persons who deal in, sell or dispose of" intoxicating liquors.

On the other hand, there are a number of courts of high character holding, as did the supreme court of Illinois, in *South Shore Country Club v. People*, 228 Ill., 75, 81 N. E., 805, 12 L. R. A. (N. S.), 519, 119 Am. St. Rep., 417, that "an incorporated social club, organized in good faith for pleasure, social recreation, and outdoor sports, with a limited membership, a clubhouse elaborate in its appointments, including library, reading room, card and billiard rooms, dining room,

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and restaurant, with outside conveniences for exercise and sport, and a place where intoxicating liquors were dispensed to and paid for by the members, without profit," was within the statute requiring a license "to conduct a dramshop." In line with that case may be cited *Martin v. State*, 59 Ala., 34; *State v. Neis*, 108 N. C., 787, 13 S. E., 225, 12 L. R. A., 412; *Army and Navy Club v. District of Columbia*, 8 App. D. C., 544; *Mohrman v. State*, 105 Ga., 709, 32 S. E., 143, 43 L. R. A., 398, 70 Am. St. Rep., 74. A full citation of cases on this subject, with an editorial review of the same, showing the varying views of the different courts, will be found in the notes to the *South Country Club Case*, supra, reported in 12 L. R. A. (N. S.), 519, and to *Barden v. Montana Club*, supra, 24 Am. St. Rep., 27. An examination of the cases will show that, while all are determined with regard to existing statutes, yet, in those involving the dispensing of intoxicants for a price to members and guests in a *bona fide* club, that the real conflict grows out of the different views entertained by courts as to what constitutes a "sale," within statutes requiring payment of a privilege tax for retailing intoxicants. All the authorities agree in holding that, where clubs are formed for the evident purpose of evading the liquor laws, such course will not be tolerated; so it is, that these cases cannot be placed on one side or the other in a controversy involving the statutory right of a *bona fide* club to dispense intoxicants for a price to its members.

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Mr. Black, in his recent work on Intoxicating Liquors (section 142, p. 185), after a review of the authorities, sums up and concludes as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law; but, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within the purpose or the letter of the law."

Coming, now, to our own decisions, the first case in which the question here involved was considered is that of *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep., 298. The Tennessee Club, of Memphis, was a social club, organized under Acts 1875, c. 142, sec. 1, subsecs. 3, 5, and maintained a library, gave musical entertainments, afforded meals for its members,

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and kept a small stock of liquors for the use of its members, who paid for each drink as it was taken. No profit was made for the club upon the liquor so sold, but the stock was in part kept up by the monthly dues of members. The opinion in the case shows that one Dwyer, as clerk of the county court, claiming that the club was under obligation to pay the privilege tax required by section 4 of chapter 149 of the Acts of 1881, from retail liquor dealers, upon a refusal to pay, threatened a distress warrant, when a bill was filed by the club, setting out the facts hereinbefore recited, and asking that he be enjoined from issuing such warrants, or "seeking in any manner to hold complainant accountable, or proceed against it as a retail liquor dealer." This injunction was granted; but the chancellor, upon motion of the defendant, dismissed the bill for want of equity on its face, and the case was then brought by the complainant to this court.

The clause in the act of 1881, relating to the privilege tax required of retail liquor dealers, and under which the county court clerk demanded the tax in question, was as follows: "Where they do business at any place not in a city or town, or in a city or town of one thousand inhabitants, or less, \$150 per annum; in a city or town of more than one thousand inhabitants and less than five thousand, \$150 per annum; in a city, or town, of five thousand inhabitants or more, \$250, quarterly or semi-annually in the same proportion."

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In the course of the opinion delivered by Cooke, J., it is said: "It cannot be controverted but that the complainant would have a right to purchase and keep liquors at its clubrooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assessments upon the members, and the mode adopted, or the form of a sale alone to its members of such a quantity for so much money, can be nothing more than a mode adopted of assessing each member in proportion to the amount he consumes, and cannot be distinguished in principle from that adopted in one of the cases referred to, of issuing checks to each member which entitles him to so much liquor . . . according to the amount of money he contributes. . . . Upon the whole case, as made by the bill, we conclude that the complainant was not a retail liquor dealer within the meaning of the statute, that it was not required to pay said tax or take out a license as such, and that the distress warrant was wrongfully issued and levied upon its property. . . ."

It is true that the court was aided in coming to the conclusion above announced, that it was not the purpose of the legislature to embrace clubs, organized and conducted as was the complainant, as retail liquor dealers, from the fact that the statute provided that retail liquor dealers should be taxed "as other merchants," and graded the tax "according to the population of the town or city in which such retail traffic is carried on,"

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the court regarding this as indicating that it was only "retailers of liquors to the public" who were contemplated by the act; yet this was not the real ground of that decision, but rather that found in the excerpt set out above.

The next case arising in this State is that of *Hermitage Club v. Shelton*, 104 Tenn., 101, 56 S. W., 838, which, it is here insisted, overruled the Dwyer Case. There it was held that the Hermitage Club, upon the agreed statement of facts, was liable to pay the privilege tax imposed on liquor dealers by chapter 432 of the Acts of 1899. It is insisted that that case is conclusive authority to sustain the conviction in the present case. It is true that the club in that case, as in the present, was a *bona fide* social club, organized or chartered under the act of 1875, and that the tax then claimed, the legality of which was sustained by this court, was under an act similar in terms to the one involved in the present controversy. The act of 1899, after classifying liquor dealers with merchants and fixing the amount of privilege tax to be paid by them, graduating it according to the population of the town, taxing district, or city in which they do business, then defined such dealer to be "every person, company, or firm, selling spirituous liquors, wines, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handled such liquors for sale." That act further provided that "the procur-

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ing of the United States revenue license by wholesale or retail liquor dealers shall be taken as *prima facie* evidence that the parties are in a wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged."

The revenue act of 1907 (Acts 1907, c. 541), which was in existence at the time of the transaction which occurred which forms the basis of the indictment in this case, was similar in terms to those just quoted from the act of 1899. The distinction, if any, between that case and the present, is not to be found in the acts, but in the facts presented by the records in the two cases. In that it was conceded in the agreed statement of facts that the Hermitage Club had taken out a United States revenue license, covering the period of time for which the State and county were demanding a privilege tax. In the present case no such license had been secured. The question there was whether the Hermitage Club had succeeded in overcoming the *prima facie* case that it was engaged in the retail liquor business by reason of having secured United States revenue license, while in the present no such question arises. While it is said that a "social club" was in the mind of the legislature in the act of 1899, yet it was conceded in the opinion that it was not such a club organized under the act of 1875 that "*per se* is subject to this privilege tax," but only when it "handles liquors for sale." This is followed by this question: "Having liquors on

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hand, dispensing them as it does, and doing this under cover of protection of a United States revenue license, as plaintiff in error established by proof, that in doing so it has not by that act been selling them." In determining whether the club had, under the given state of facts, established by proof that it had not been engaged in selling liquors, it was said as follows: "While profit is not essential to a perfected sale, yet, if it was, it is apparent in this case that profit is earned in the handling of its liquors. It is true that this profit does not go to the members, and under its charter could not do so. But it does 'go into a general fund, and that fund is not used alone to replenish that which has been consumed, but in defraying the general expenses of the club.' . . . But, in addition, not only is liquor dispensed to members, but also to guests as they may require. The same methods are pursued in both cases, and the proceeds, including the equivalent for the outlay, 'whatever of profit was made' by these sales of liquor, went back into the general fund. So it was upon these admitted facts that it was held the club had failed to establish proof that it was not within the terms of the act in question."

From what has been said, the leading and controlling facts upon which that case went off are so dissimilar from those in the present case that we do not regard it as a controlling authority. Not only is this record without suggestion that there was a profit made in the disposing of the liquors in this Elks' Lodge, which was

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carried into a "general fund" to be used as might be in defraying the expenses of the club; but the fact is that no profit was made, the price charged for the liquor served being the simple equivalent of its price and the cost of serving the same to the members. Further, while in the Hermitage Club liquor was served to members and invited guests, who stood on the same ground and were served alike in the dispensing of intoxicants and payment for the same, in the Elks' Lodge these intoxicants were served alone to the members of the lodge. In addition, in the one case, as has already been said, the Hermitage Club had conceded its liability as a retail liquor dealer by taking out a United States revenue license; in the present case no such thing was done.

In the course of the opinion in that case it was said: "But it is insisted that the case of *Tennessee Club v. Dwyer*, 11 Lea, 452 [47 Am. Rep., 298], had adjudicated this question, and upon similar facts to these in the present record has determined that a social club, such as is the plaintiff in error, is not in the sense of the law a liquor dealer. The reasoning and authority of that case are fully recognized by the court; but we do not think its conclusions controlling in the present." Following this statement, the court marked the difference between the two cases. There, instead of overruling the earlier case, it is said that it is recognized and approved.

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With the single exception that the act of 1899 and the act of 1907 embraced by name a "social club," and where engaged "in handling intoxicating liquors for sale," requiring it in such case to pay a retail liquor dealer's license, this case is as distinct in its facts from that as was the *Hermitage Club Case* from that of *Tennessee Club v. Dwyer*. We think the latter of these cases can be appealed to as authority by the plaintiff in error.

We are satisfied from the uncontroverted facts in the record that the Knoxville Lodge of Elks, like the present lodge, is a *bona fide* association, organized for social, fraternal, and benevolent purposes, and that the furnishing of refreshments, inclusive of intoxicants, to its members, is purely incidental, and that the lodge was not engaged in the "handling of liquor for sale," within the sense of the revenue act of 1907. From this it follows, of necessity, that the plaintiff in error, who was simply its employee and doing its service, was not guilty of the misdemeanor of either "selling or aiding in the sale" of "intoxicating liquors," created by section 1 of chapter 161 of the Acts of 1899.

It may be proper to observe, in conclusion, that it is a matter of common knowledge, of which we may take judicial notice, that since the legislative enactment of the various statutes, extending from time to time the territorial scope within which intoxicating liquors cannot be legally sold, clubs have sprung up in great numbers in different localities, and obtained charters, whose

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apparent purpose is to evade, if possible, under the forms of law, the effect of these statutes. It is hardly necessary to say that such a club can find no warrant for its existence in the present holding. Whenever, in any case, the legality of its action in this regard is challenged by the State, it will be the duty of the court to scrutinize closely, in order to see that no such device is attended with success. In every case, when the serving of liquor to members, or others, is the principal purpose, or one of the chief objects, of such an organization, and not a mere incident, or when it is sold for a profit, this being carried into a general fund for meeting the expenses, or into a special fund for the payment of salaries, or for distribution among its members, or otherwise, the disguise should and will be uncovered, and the club and its members made amenable to the law.

The judgment of the trial court is reversed.

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H. B. CARHART v. WHITE MANTEL & TILE COMPANY.

(*Knoxville*. September Term, 1909.)

1. **LANDLORD AND TENANT.** Lease is not renewed by holding over and paying original rental, under a privilege to renew lease at increased rental.

Where a lease provides for an additional term at an increased rental, and the tenant holds over after the expiration of the lease period and pays the increased rental, this constitutes affirmative evidence on his part that he has exercised the option to take the lease for the additional term; but where such tenant so holding over does not pay the increased rental so stipulated for, but continues to pay the original rental which the lessor accepts, without objection or demand of additional rental, this negatives the idea of the acceptance of the additional term, and such tenant occupies the *status* of a tenant at will. (*Post*, - pp. 460-470.)

Cases cited and approved: *Insurance Co. v. Bank*, 71 Mo., 58; *Delashman v. Berry*, 20 Mich., 292; *Terstegge v. Society*, 92 Ind., 82; *Murtland v. English*, 214 Pa., 325; *Stone v. Stamping Co.*, 155 Mass., 267.

2. **SAME.** Same. Tenant holding over and paying same rental is tenant at will; case in judgment.

Where a lease for one year at a rental of one hundred dollars per month, payable monthly, gives the lessee the privilege of leasing the building two additional years, at the rate of \$1,320 per year and \$1,500 per year, respectively, payable monthly, and provides that "for no reason shall this lease be construed to continue for more than the time as set out herein, and occupancy by tenant thereafter shall be from month to month at the pleasure of the lessor;" and where the lessee, at the expiration of the term, gives no notice of intention to renew the lease, but holds over, paying the original rental, which is

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accepted by the lessor, without objection on account of his overlooking the provision as to increased rental, the lessor holds as tenant at will, and is not liable for the increased rental.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
H. L. McCLUNG, Chancellor.

JOHN W. GREEN, for complainant.

R. A. SANSOM, for defendant.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The object of this bill is to collect an alleged balance due complainant on rentals of a storehouse situated on Jackson street in the city of Knoxville. The solution of the question of liability on the part of the defendant depends on the proper construction of a written lease executed by the parties.

The complainant, H. B. Carhart, is a resident of the city of New York, and through his agent, Alex. McMillan, leased the premises in question to the White Mantel & Tile Company. The material portions of the lease necessary to be quoted are as follows:

"This indenture, made this 26th day of February, 1906, between Alex. McMillan, agent for H. B. Car-

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hart, of the first part, and the White Mantel & Tile Company, of the second part, witnesseth: That the party of the first part hereby leases to the parties of the second part the following premises, to wit: The three-story and basement brick building situate No. 121 West Jackson ave., Knoxville, Tenn.

"It is understood and agreed to that the parties of the second part are given the privilege of leasing this building two additional years from the expiration of this lease at the rate of \$1320 per year and \$1500 per year, respectively, payable monthly.

"For the space of one year from February 1, 1906, and covenants to keep the tenant in quiet possession of the premises during said term.

* * * * *

"In consideration whereof the parties of the second part bind themselves to pay for the same \$100 on the first of each and every month, being at the rate of \$1200 per annum," etc.

Among other stipulations in the lease is the following:

"(12) It is specifically understood that for no reason shall this lease be construed to continue for more than time as set out herein, and occupancy by tenant thereafter shall be from month to month at the pleasure of the lessor."

The defendant lessee took possession of the premises February 1, 1906, and remained in possession till February 1, 1908. There was no renewal or extension, or

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any additional contract, oral or written, entered into between the parties; but the defendant lessees continued to hold over, paying the same rental. It appears that McMillan, the agent, collected rent during the two years the lessees were in possession at the rate of \$100 per month, or \$1200 per annum, and during the second year there was no demand on the part of the agent for any additional rentals, although, as stated, the contract provided that the rental for the second year should be \$1320. This is explained by the fact that, when the lease was executed, Mr. McMillan sent the copy thereof to complainant, who resides in New York, and McMillan, not having the lease in his possession, overlooked its terms, and accepted the \$100 per month for the second year. Complainant testifies that, when he received the lease from McMillan, he put it in his safe, and, having forgotten the terms thereof, he accepted, through oversight, the \$100 per month sent him by McMillan. His recollection of the terms of the lease was not refreshed until about January, 1908, when he was informed that the lessees were about to vacate the property, when he examined the lease and discovered that he was entitled to \$110 per month for the second year, and that the lessees were still indebted to him in a balance of \$120. It is agreed that the receipts executed by McMillan to the lessees recited payment in full; but, as stated, the contention on behalf of complainant is that this was an oversight, both on the part of himself and McMillan, his agent. It is also admitted that, when

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complainant and his agent discovered the mistake, a demand was made by the lessees to correct the matter; but additional payments were refused.

It will be observed that the lease on its face provides for a rental for one year from February 1, 1906, to February 1, 1907, at the rate of \$1200, and contains the following clause as to the subsequent years, namely:

"It is understood and agreed that the parties of the second part are given the privilege of leasing this building two additional years from the expiration of this lease at the rate of \$1320 per year and \$1500 per year, respectively, payable monthly."

It is the contention of complainant that the defendant lessee, by holding over after the first year, became liable for the increased rental prescribed for the two succeeding years, amounting to a balance of \$120 for the year ending February 1, 1908, and the entire rent, amounting to \$1500, for the third year, to wit, the year 1909. Defendant, on the other hand, denies any liability whatever under the contract, averring (1) that it had paid all the rent due or demanded of it up to February 1, 1908, when it surrendered possession; (2) that the lease had terminated by its express terms when defendant vacated the premises; and (3) that the building had become damp and unfit for use, and that on this account defendant was well warranted in abandoning the premises.

Defendant in its answer further avers that under the terms of the lease its holding over for an additional per-

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iod beyond the first year was a rental from month to month at the pleasure of the lessor, and that the lease itself simply gave the defendant the privilege of making a new lease of the building for two additional years, and not the privilege of renewing or extending the old lease two additional years. The contention of the lessee is that, in order to have rendered itself liable for the rentals of the second and third years, it was necessary that it should have executed a new contract embracing the terms and stipulations under which the defendant was to hold. As already seen, the written lease between the parties provided that the lessee was "given the privilege of leasing this building two additional years from the expiration of this lease at the rate of \$1320 per year and \$1500 per year, respectively, payable monthly."

The question presented for the determination of this court is in respect of the proper construction of this clause of the lease.

In Underhill on Landlord and Tenant (Ed. 1909), sec. 803, it is said:

"It is often necessary to distinguish between a lease for a term, with a provision that at the election of the lessee it shall be continued for a further term, and a lease for a fixed term with a covenant that on or before the expiration of that term the lease shall be renewed if the lessee shall so elect. The question is always one of construction, dependent wholly upon the language of the lease in each case. No general rule can be gath-

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ered from the cases by which one can distinguish between a present demise, which shall terminate at a fixed date or shall endure for a further period thereafter at the option of the tenant, and a lease for a definite term, with an agreement to make a new lease when it shall have ended. Thus a lease for a term of five years, with the privilege of renting for another term, requires a new lease to be executed, and the mere holding over by the tenant is not a renewal. But in the same State it has been held that a lease of three years, with a privilege of five years, does not require any renewal, for the exercise of the option by continuing in possession extends the lease. The lessee can either get out or stay in at the end of the three years. So where a lease gives a lessee a renewal at his election, and he elects to continue, a present demise is created, which is subject to all the conditions and covenants of his former lease, and it is not necessary that a new lease shall be executed. In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties. The reason for the presumption is the fact that the making of a new lease would involve trouble and expense, which should be avoided by the courts, if possible, unless it is very clear that the parties have previously agreed to incur such

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trouble and expense. For if the new lease, as is always the case, when executed, is but a substitute for and a re-execution of the old lease, it is in no wise more efficacious or obligatory, nor does it confer any greater rights, than the old. Hence a court of equity will not direct the performance of a useless ceremony but will regard such leases as conferring a vested interest in the lessee at their execution, with an option in him to continue or determine that interest at some future date. In all cases where, from the language of the lease, viewed in connection with the circumstances of the case, it is clear that the execution of a new lease was not the intention of the parties, but that the provision was for an extension, the continuing in possession of the lessee after the lease has expired without notice to the landlord, unless notice is expressly required, is an extension of the lease, and operates to continue the relation of landlord and tenant."

Another case cited by counsel for complainant is *Insurance Co. v. National Bank*, 71 Mo., 58. In that case the lease provided that the lessee should hold a certain bank building from May 1, 1867, "for and during a term of three years at a yearly rental of \$7000, payable \$583.33 monthly when due. . . . And the said lessee has the privilege of a renewal for ten years more from the expiration of this lease at a yearly rental of \$7000 payable monthly." The lessee entered into possession, continuing in possession for the original term of three years, when, without requesting a new

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lease or entering into one, the tenant continued in possession as he had previously done until May 31, 1876, when he removed from the premises. The landlord sued for the rent, and the tenant contended that the terms of the lease required the landlord to make a new lease, and that the only effect of the continued occupation of the premises was to create a new contract for a tenancy from month to month. The supreme court of Missouri, in deciding the case, said:

"It is conceded that, when a lease provides simply for an extension of the term at the option of the lessee, nothing need be done by the lessor, and the occupation and payment of the rent constitute sufficient evidence of the lessee's election to so extend the term; but it is insisted that when the lease provides for a renewal at the option of the lessee, though for a specified time and at a designated rate, there must be affirmative action of the lessor as well as the lessee, and that in the absence of such express contract the only contract existing between the parties is that which the law will imply. It may be doubted whether the word 'renewal,' as employed in the lease, implies anything more than an extension of the term. . . . After the expiration of the original term of three years, the defendant could only remain in possession of the demised premises in one of two ways: (1) By holding over under the terms of the original lease; (2) by accepting the terms of the renewal therein provided for. . . . Under these circumstances, we think the defendant is estopped to deny

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that the term had been extended under the clause of renewal."

In *Delashman v. Berry*, 20 Mich., 292, 4 Am. Rep., 392, the lease provided that the lessee should hold the premises "for a term of one year, with the privilege of having the same three years at the same rent, at the option of the lessee." The lessee remained in possession three years after the expiration of the first year, and was sought to be held liable for the full term of three years as though the lease had been formally renewed. On this subject the supreme court of Michigan held as follows:

"The circuit court held in effect that this continuance in possession after the expiration of the first year was not the exercise of the option thus to continue for a longer period, and that, to give him the right to continue for the optional term, he was bound to give actual notice of such intention at the end of the first year, or at least before the suit to eject him was commenced. Such a notice, had it been given, would have been a notice only of the lessee's intention to continue the same occupation upon the same terms as before; and, upon principle, it would certainly seem that actual continuance of such occupation was the best and most conclusive evidence of his intention to continue. But one inference could legally and properly be drawn by such continuance after the year, namely, that he intended to continue regularly according to the terms of his lease rather than wrongfully in defiance of its provisions. If

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he elected to remain at all after the first year, he must be held to have remained under and according to the terms of the lease."

Another case cited by counsel for complainant in his brief is *Terstegge v. First German Society*, 92 Ind., 82, 47 Am. Rep., 135. In that case the lease contained the following provision, viz.: "Said party of the first part hereby rents and leases for a period of five years, from January 1, 1874, with the privilege of five years more," etc. The lessee did not surrender the premises at the expiration of the five-year term, but elected to hold over. The supreme court of Indiana held as follows:

"We must hold that if the society (the lessee) remained in possession of the premises after the expiration of five years, and paid the rent according to the lease, and nothing was said by either party upon the subject of an additional five-year holding, such holding over was an election to hold for an additional five years, and bound the society for the rent."

When these authorities are applied to the paragraphs of the lease in question, it is insisted that the words "privilege of leasing" are equivalent to "privilege of holding," or "privilege of occupying." It is further said the terms of the contract for the second and third years, the parties to the contract, as well as its subject-matter, are all specifically described, and there could be no practical utility in the execution of a new lease, but on the other hand, it would involve trouble and expense. Now

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it is insisted by counsel for the lessor that where a lease is given for a term of years, with the provision that at the expiration of the term the lessee, at his option, may have an extension thereof for an additional period, the mere holding over by the lessee constitutes an acceptance of the option to extend and binds the lessee for the additional term. The covenant or agreement to extend is a present demise, which becomes operative immediately upon the exercise of the option conferred. The law is so announced in Cyc., vol. 24, p. 1008, and Amer. and Eng. Ency. of Law, vol. 18, p. 690.

It is insisted by counsel for the lessees that the weight of authority is to the effect that the mere holding over of the lessee without any affirmative act on his part constitutes him merely a tenant at will, or from month to month. It is insisted that there must be some affirmative act by the lessee, in addition to mere continued occupancy, to render the contract of renewal operative.

However, the exact position of the lessees is that the present case does not involve either an extension of a lease or the renewal of a lease; but the inquiry is whether the property had been really leased for two additional years beyond the period of the present lease, and whether or not the holding over constitutes such a leasing. It is strenuously insisted on behalf of the lessee that it does not.

Having thus stated the contentions of the respective parties, we shall now state our own conclusions.

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In the first place, we are of opinion that the mere continuance of occupancy by the tenant or lessee after the expiration of the lease period is ordinarily accepted as the exercise of the option reserved in the lease to occupy the premises for an additional term. This is the presumption that ordinarily arises from the mere fact of holding over; but it is not conclusive of the lessee's intention to accept the lease for an additional term. If the lease, as in this case, provides for an additional term at an increased rental, and after the expiration of the lease period the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term; but where, under a lease like the present, the tenant holds over after the expiration of the original term, and does not pay the increased rental as provided by the lease, but continues to pay the original rental, which is accepted by the lessor, this negatives the idea of the acceptance of the privilege of an additional term. Under such circumstances, the lessee holding over will occupy the *status* of a tenant at will.

This distinction is recognized by the supreme court of Pennsylvania in the case of *Murtland and Others v. Joseph J. English*, 214 Pa., 325, 63 Atl., 882, 112 Am. St. Rep., 747, wherein the court said:

"We can see no merit in the suggestion that mere continuance in the possession of the premises after the lease had expired was in itself an acceptance of the option upon the part of the tenant for an additional term

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of five years. The authorities cited on behalf of appellant apply only to cases in which no specific notice of an intention to exercise the privilege of renewal is prescribed in the lease. There might be conduct, such as the payment of an increased rental, which would be equivalent to an acceptance of the option. Thus in *Stone v. St. Louis Stamping Co.*, 155 Mass., 267, 29 N. E., 623, where the lease provided for a renewal at an increased rental, the holding over and payment of the increased rent by the lessee was considered evidence of his election to renew, although no proof was offered of the notice prescribed in the lease having been given. But in the case at bar the tenant neither gave notice nor paid any increased rental. There was nothing to indicate that the tenant had any intention of binding himself to stay upon the premises for another full term of five years. And when he held over after the expiration of the term, without making any new arrangement, the tenancy became one for another year upon the same conditions as before."

This case is reported in 6 Am. and Eng. Ann. Cas., 339, and is fully annotated, and the text of the opinion shown to be supported by the weight of authority. In the note it is said:

"The general rule is that where a lease grants to the lessee the option of a renewal at the expiration of the original term, without any requirement that notice shall be given as to the election to renew, and the lessee holds over after the expiration of the term, the presumption is

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that he has elected to renew his lease in accordance with the terms of the option"—citing many cases.

Again it is said in the note:

"The holding over is merely *prima facie* evidence of the election to renew, and the presumption so raised is not conclusive, but is rebuttable by evidence"—citing *Atlantic Nat. Bank v. Demmon*, 139 Mass., 420, 1 N. E., 833.

Again the annotator says:

"The general rule stated above regarding the right of the lessor to consider holding over an election to renew generally applies, although the lease contains a provision that notice shall be given in case the lessee desires to exercise his option, as the requirement is for the benefit of the lessor, and not for the lessee, and may be waived by the former"—citing many cases.

We think this is a correct statement of the law and is controlling in the present instance. It has already been seen, from the paragraph quoted from the lease, that no notice is required of the lessee's intention to hold over; but he is given the privilege of leasing for an additional term of two years at an increased rental. The lessee gave no notice of his intention to exercise the privilege of leasing for an additional term, but merely continued in the occupancy of the premises, paying the same rental he was required to pay for the original term. The agent of the lessor accepted the same rental from month to month for the whole period of the second year, and paid over these amounts to the complainant

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without objection or demand of additional rental on the part of either. It is not denied that the agent, as well as complainant himself, overlooked the terms of the lease requiring the payment of additional rental in the event of the occupation of the premises after the expiration of the original term of one year. This, however, does not change the rule of law that, where the tenant holds over and continues to pay according to the terms of the original lease, the presumption that he has accepted the additional term is rebutted, and he must be regarded, under such circumstances, as a tenant at will, with the right of the landlord to oust him at any time for the nonpayment of the increased rental prescribed by the contract for the additional term.

We are further of opinion that the defendant, White Mantel & Tile Company, never having exercised the option of leasing the premises for an additional term, had a right to vacate in January, 1908, without incurring any further liability for rent, it being conceded at that time that the lessees had paid, and the lessor had accepted, all the rent due according to the rates stipulated for the original term.

The decree of the chancellor will be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1909.

E. R. RICHARDSON *et al.* v. S. M. YOUNG *et al.*

(Nashville. December Term, 1909.)

1. CONSTITUTIONAL LAW. Powers of government divided into legislative, executive, and judicial departments.

The State constitution divides the powers of government into three distinct, independent, and co-ordinate departments, namely, legislative, executive, and judicial, with express prohibition against any encroachment by one department upon the powers, functions, and prerogatives of either of the others, except as directed or permitted by some other provision of the constitution, and such division of powers and absolute separation of such departments is essential to the maintenance of the republican form of government guaranteed to the States by the federal constitution. (*Post*, pp. 490-493.)

Constitution cited and construed: Art. 2, secs. 1, 2, and 3; art. 3, sec. 1; art. 6, sec. 1.

Cases cited and approved: *State v. Armstrong*, 3 Sneed, 634; *Mabry v. Baxter*, 11 Heisk., 682-689.

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2. SAME. Same. Theoretical definition of legislative, executive, and judicial powers.

The constitution does not define in express terms what are legislative, executive, or judicial powers; but, theoretically, the "legislative power" is the authority to make, order, and repeal the laws; the "executive power" is the authority to administer and enforce the laws; and the "judicial power" is the authority to interpret and apply the laws. (*Post*, p. 493.)

3. SAME. Same. Same. Theoretical division of powers is departed from in many instances in the constitution.

Our State constitution as well as the federal constitution, and those of a great majority, if not all, of the States, departed from the theoretical division of powers of government as defined in the preceding headnote, and in many important matters vested in each of the departments powers and authority that in strictness would belong exclusively to others; and in some instances all departments are vested with the same power, to be exercised concerning different matters, and this is especially noticeable in the vestiture of political powers. (*Post*, pp. 493-496.)

Cases cited and approved: *Crane v. McGinnis*, 1 Gill & J. (Md.), 476; *Baltimore v. State*, 15 Md., 457; *Hovey v. State*, 119 Ind., 395; *Fox v. McDonald*, 101 Ala., 51.

4. SAME. Governor has no prerogative powers, but only such powers as are vested in him by the constitution.

All sovereign power is vested in the people; and the chief executive has no prerogative powers, as in monarchical governments, but only such powers as are vested in him by the constitution as the fundamental law. (*Post*, p. 496.)

5. SAME. Power of election or appointment to office is a political power, not inherently belonging to any department.

The power of election or appointment to office is a political power, not inherently legislative, executive, or judicial, and one that may be vested with equal propriety in either of them. (*Post*, pp. 497-504, 514, 515, 516.)

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Numerous cases in other States cited and approved in the opinion, page 498, and some of them reviewed, pages 498-502.

Numerous cases in other States cited, and distinguished or disapproved in the opinion, pages 502-504).

6. SAME. Same. Power of appointment to office, not otherwise vested, may be exercised by the legislature.

In view of the constitutional history and legislative practice and the practical contemporaneous construction acquiesced in for more than seventy-five years concerning the vestiture and exercise of the power of appointment to office, and in view of the general provisions of the constitution (art. 2, sec. 3; art. 3, secs. 2 and 14; art. 6, secs. 3, 4, and 5; art. 7, secs. 1, 2, 3, and 4; art. 8, sec. 2) vesting power in the governor to fill certain offices and certain vacancies, and in view of other general provisions vesting certain elections in the people and certain appointments in the courts, and in view of the special provision (art. 7, sec. 4) that the election of all officers and the filling of all vacancies not otherwise directed or provided for by the constitution shall be made in such manner as the legislature shall direct, the whole appointive power is thus expressly disposed of, and there is nothing left for implication or construction, and the power of appointment to fill an office created by the legislature, and not made elective by the people, is not an executive function inherent in the executive department, when not otherwise expressly vested by the constitution or statute, but a political power, which, consistently with the distribution of powers of government, may properly be vested in either the legislative, executive, or judicial departments by the legislature; and hence the statute (Acts 1909, ch. 103, sec. 1) authorizing the election of the State board of elections by the legislature, instead of their appointment by the governor, is not for that reason unconstitutional. (*Post*, pp. 504-522.)

Acts cited and construed: Acts 1909, ch. 103, sec. 1.

Constitution cited and construed: Art. 2, sec. 3; art. 3, secs. 2 and 14; art. 6, secs. 3, 4, and 5; art. 7, secs. 1, 2, 3, and 4; art. 8, sec. 2.

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Cases cited and approved: *Den v. Land Co.*, 18 How., 280; *Baltimore v. State*, 15 Md., 457; *Americus v. Perry*, 114 Ga., 881.

7. **SAME.** Same. Same. Legislature may appoint to office by act or joint session, where not otherwise provided by the constitution.

The constitutional provision (art. 7, sec. 4), that the election of all officers and the filling of all vacancies, not otherwise directed or provided for by the constitution, shall be made in such manner as the legislature may direct, authorizes the legislature to exercise the appointing power by legislative act, or in joint session of the members of the two houses; for where the constitution authorizes the legislature to direct a thing to be done, it may itself do that thing, upon the principle that the greater power includes the less. There is no limitation of the agencies it may employ. (*Post*, pp. 516-522.)

not always true

Constitution cited and construed: Art. 7, sec. 4.

Cases cited and approved: *Luehrman v. Taxing District*, 2 Lea, 440, 444; *Redistricting Cases*, 111 Tenn., 234, 291, 292; *People v. Langdon*, 8 Cal., 17; *People v. Freeman*, 80 Cal., 233; *Gerino, Ex parte*, 143 Cal., 414 (citing *People v. Province*, 34 Cal., 541; *Bulger, In re*, 45 Cal., 559); *Americus v. Perry*, 114 Ga., 881; *People v. Hurlbut*, 24 Mich., 64 (citing *People v. Bennett*, 54 Barb. [N. Y.], 480); *Attorney-General v. Bolger*, 128 Mich., 355; *Sturgis v. Spofford*, 45 N. Y., 446; *Fox v. McDonald*, 101 Ala., 51; *Cunningham v. Sprinkle*, 124 N. C., 642; *Cherry v. Burns*, 124 N. C., 761; *Commissioners v. George*, 104 Ky., 260; *Cox v. State*, 72 Ark., 97.

8. **SAME.** Persons not affected by the invalidity of a separable part of a statute cannot raise question as to the same, when.

The persons appointed by the governor as members of the State board of elections under the original statute (Acts 1907, ch. 435) cannot, in proceedings to establish their right to the office as against the persons holding said office under an amendatory statute (Acts 1909, ch. 103), demand or call for a determination of the question as to the constitutionality of the third and

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fourth sections of such amendatory statute which are assailed upon the ground that they impose a political test as a qualification for office in violation of the constitution (art. 1, sec. 4) prohibiting a political test, further than an oath to support the federal and State constitutions, as a qualification for office, where the alleged invalidity of said sections, if conceded, would not render the whole amendatory act void; for such parties are not interested in these particular amendments as taxpayers, because no burdens are imposed by them, nor as citizens, because they are not affected in any way not common to all the citizens of the State. (*Post*, p. 522.)

Acts cited and construed: Acts 1907, ch. 435; Acts 1909, ch. 103, secs. 3 and 4.

Constitution cited and construed: Art. 1, sec. 4.

Case cited and approved: *Patton v. Chattanooga*, 108 Tenn., 197.

9. SAME. The invalidity of an independent and severable part of a statute will not vitiate the valid parts, when.

Where an amendatory act (Acts 1909, ch. 103, amending Acts 1907, ch. 435) was passed for two distinct purposes, one of which was, as shown by the first section of the later act amending the first section of the prior act, to take from the governor the power to appoint the members of the State board of elections, and vest it in the general assembly, while the other was, as shown by the third and fourth sections of the later act amending the fourth and eighth sections of the prior act, to define and fix the qualification and character of the appointees, the first amendment concerning the appointing power, and the second the appointees, the two amendments are separate and independent matters. The change as to the appointive power does not affect the qualifications and character of the appointees, and the appointive power under the amended act will be governed by the provisions of the original act, as to the qualifications and character of the appointees, in making the appointments, if the third and fourth sections of the amendatory act are unconstitutional, upon the well settled rule that the invalidity of one

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provision of a statute will not vitiate those that are valid, where the invalid and valid provisions are severable and independent. (*Post*, pp. 522-524.)

Acts cited and construed: Acts 1907, ch. 435, secs. 1, 4, and 8; Acts 1909, ch. 103, secs. 1, 3, and 4.

Cases cited and approved: *Tillman v. Cocke*, 9 Bax., 429; *Reelfoot Lake Levee District v. Dawson*, 97 Tenn., 179; *State v. Trehwitt*, 113 Tenn., 561; *Turnpike Co. v. Telephone Co.*, 118 Tenn., 88, 92, 99; *State v. Washburn*, 167 Mo., 680.

10. SAME. Constitutionality of a statute will not be determined when not necessary.

The courts will not pass upon the constitutionality of a statute, when not required for the decision of the case, and where the determination of the question would not affect the rights of the litigants. (*Post*, p. 524.)

Acts cited and construed: Acts 1909, ch. 103, secs. 3 and 4.

11. CONTESTED ELECTIONS. Chancery has no jurisdiction.

The chancery court has no jurisdiction of election contests. (*Post*, p. 525.)

Case cited and approved: *Shields v. Davis*, 103 Tenn., 539.

12. ELECTIONS. Provision requiring day of election of State board of elections to be fixed by joint resolution is not mandatory, but directory, governor's veto is ineffective.

The statute (Acts 1909, ch. 103, secs. 1 and 2, amending Acts 1907, ch. 435, sec. 1) requiring the State board of elections to be elected by the joint vote of both houses of the general assembly, upon a date to be fixed by joint resolution of the general assembly, instead of being appointed by the governor, expressly takes from the governor all control over their election, and vests it solely in the members of the general assembly, so that the governor cannot control such election by veto of the resolution; and the provision requiring the day of election to be fixed by joint resolution is not mandatory, but merely directory, and all that is necessary is that a time and place for the elec-

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tion be definitely fixed by the two houses of the general assembly, and the failure to make the agreement in a particular form, or any irregularity in the assembling, will not defeat an election otherwise valid. (*Post*, pp. 524-530.)

Acts cited and construed: Acts 1907, ch. 435, sec. 1; Acts 1909, ch. 103, secs. 1 and 2.

Cases cited and approved: *Winston v. Railroad*, 1 Bax., 78; *Covington's Case*, 29 Ohio St., 117.

13. **SAME.** Same. Governor's veto of a joint resolution fixing date of election of officers by the general assembly does not affect the resolution or the election under it.

The joint resolution fixing the day of the election of the State board of elections by the joint vote of both houses of the general assembly is not one which the constitution (art. 2, sec. 18) requires to be presented to the governor, and which cannot be effective without his approval, or adoption notwithstanding his veto, because that provision only concerns resolutions or orders which are legislative in their character, and does not relate to those in regard to mere matters of formal procedure, of which the house and senate have exclusive control; and a joint resolution fixing the date for the election of officers by the general assembly is not in any sense legislative, but concerns political functions solely within the jurisdiction and control of the legislature, or the members thereof, in regard to which the governor has no authority or duty to perform; and there can be no possible reason for giving him notice of such election or obtaining his consent or approval of an agreement fixing the date for holding it, for he has absolutely nothing to do with such election. (*Post*, pp. 530-537.)

Acts cited and construed: Acts 1909, ch. 103, sec. 2.

Constitution cited and construed: Art. 2, sec. 18.

Cases cited and approved: *Hollingsworth v. Virginia*, 3 Dall., 381; *Commissioners v. George*, 104 Ky., 260; *Haight v. Love*, 39 N. J. Law, 14; *Erwin v. Mayor*, 60 N. J. Law, 141; *State v. Duluth*, 53 Minn., 238; *Rich v. McLaurin*, 83 Miss., 95.

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14. **SAME.** Same. Same. Presentment of resolution fixing date of elections by general assembly to the governor, and his veto thereof, cannot affect the resolution, or the election under it.

The fact that the resolution fixing the place and time for the election of the State board of elections by the general assembly was presented to the governor, and disapproved by him, did not destroy it; for when it was duly passed, as it was, the law (Acts 1909, ch. 103, sec. 2) was fully complied with, and what happened afterwards was immaterial, and cannot affect the validity of the resolution, or the election made under it. (*Post*, p. 537.)

15. **CONSTITUTIONAL LAW.** Question whether the constitutional quorum of each house of the general assembly applies to the joint convention of both houses is reserved, and not decided, but the negative is indicated.

The joint convention of the senate and house of representatives of the general assembly for the purpose of electing officers is not composed of the senate and house as distinct bodies, but is merely an electoral college composed of the members of the general assembly, without regard to the branch of the general assembly to which they were respectively elected, and all the members stand upon an equality as members of the convention. This convention is not a part of the legislative department, and has no legislative powers. Such convention is a deliberative body whose sole power is the political function of electing officers, and, inasmuch as its organization and proceedings are not regulated by any statute or constitutional provision, it would seem, like all other such bodies, this body would have the power to elect its own officers, and adopt its own rules and be governed by established parliamentary usages and laws, one of which is that a majority of the members constitute a quorum to do business, and a majority of that majority controls and has the power to do the work of the whole. From the foregoing principles it is argued, but, because deemed unnecessary for the reason stated in headnote 17, it is not decided that the constitutional provision (art. 3, sec. 11) that "not less than two-thirds

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of all the members to which each house shall be entitled shall constitute a quorum to do business" applies exclusively to the two houses when acting separately for the purposes of legislation, or doing other business which each, as a separate house, has the power to do, and not when their members meet in joint convention for political purposes, such as the election of officers. (*Post*, pp. 537-550, 565.)

Code cited and construed: Secs. 1136, 1138, 1139, 1141 (S.); secs. 1003, 1005, 1006, 1008 (M. & V.); secs. 812, 814, 815, 816a (T. & S. and 1858).

Acts cited and construed: Acts 1909, ch. 103, sec. 1.

Constitution cited and construed: Art. 3, sec. 11.

Cases cited and approved: *Lawrence v. Ingersoll*, 88 Tenn., 62; *Snow v. Hudson*, 56 Kan., 386; *Tillman v. Otter*, 93 Ky., 600; *Whiteside v. People*, 26 Wend. (N. Y.), 634; *Beck v. Hanscom*, 29 N. H., 213; *Kimball v. Marshall*, 44 N. H., 465; *Davidson v. Call*, 2 Hinds' Prec. of the House of Rep., sec. 1060.

- 16. ELECTIONS.** By joint convention of the general assembly is authorized by requirement of election by joint vote of both houses.

A statute or constitutional provision requiring officers to be elected by the joint vote or ballot of both houses of the legislature, by implication, clearly authorizes a joint convention of the members of the general assembly for such election purposes, and this has been the uniform custom. (*Post*, pp. 537, 538.)

Acts cited and construed: Acts 1909, ch. 103, sec. 1.

Constitution referred to and construed: Art. 7, sec. 3.

- 17. CONSTITUTIONAL LAW.** Question whether election by joint vote of the general assembly was invalid for want of constitutional quorum of senate was reserved, because cured by appointment.

In a suit to establish the right of complainants as members of the State board of elections under an appointment by the governor, as against the defendants appointed as such members by the

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comptroller, treasurer, and secretary of State, pursuant to Acts 1909, ch. 103, sec. 3, after the adjournment of the legislature, it is not necessary or determinative of the case to decide whether the attempted election of the defendants as such members by the joint vote of the general assembly pursuant to the first section of said act was invalid for want of a constitutional quorum of the senate in the convention, as shown in headnote 15; for, if the successors of complainants have been either lawfully elected or appointed, the terms of complainants have expired and they have no standing in court; and it being determined that such appointment was valid, as shown in headnote 18, it was unnecessary to determine whether such election was valid. (*Post*, pp. 537, 550, 565.)

Acts cited and construed: Acts 1909, ch. 103, secs. 1 and 3.

18. ELECTIONS. Vacancies in State board of elections may be filled by secretary of State, comptroller, and treasurer, when.

Under a statute (Acts 1909, ch. 103, sec. 3) providing that all vacancies in the State board of elections shall be filled by the joint vote of the general assembly, except vacancies occurring while it is not in session, when, if the office of only one member is vacant, the remaining members of the board shall fill the vacancy, and if they fail to do so within thirty days, it shall be filled by the secretary of State, comptroller, and treasurer, and that if there be more than one vacancy, it shall be filled by appointment by such officers, it is decided, in view of the fact that a newly created office is vacant until it is filled, and that the word "vacant" when applied to office, means "without an incumbent," regardless of when or how it became vacant, and that the words "occur" and "happen," when referring to vacancies in office, are synonymous, and mean "existing" or "to be found," that the comptroller, secretary of State, and treasurer are authorized to fill two or more vacancies in the State board of elections during the recess of the legislature, without regard to the time when the vacancies occurred, whether during the recess or while the legislature was in session. (*Post*, pp. 550-565.)

Acts cited and construed: Acts 1909, ch. 103, sec. 3.

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Constitution of the United States cited and construed: Art. 1, sec. 3; art. 2, sec. 2.

Cases cited and approved: *State v. Glenn*, 7 Heisk., 472; *Condon v. Maloney*, 108 Tenn., 32; *State v. Akin*, 112 Tenn., 603; *Farrow, In re*, 3 Fed. (C. C.), 112; *Clarke v. Irwin*, 5 Nev., 129; *Fritts v. Kuhl*, 51 N. J. Law, 192, 194, 195, 196; *Fairbank v. Antrim*, 2 N. H., 105; *Pike v. Jenkins*, 12 N. H., 255; *Miller v. Washington*, 2 Hayw. & H., 244; *Walsh v. Com.*, 89 Pa., 419; *State v. Ware*, 13 Or., 380; *In re Representation Vacancy*, 15 R. I., 621; *Elliott v. Burke*, 113 Ky., 479; *Senate Election Cases*, sec. 2, subsecs. 107, 110; *Opinions of Attorneys-General*, vol. 3, p. 673; vol. 4, p. 523; vol. 7, p. 187; vol. 12, pp. 32, 499; vol. 16, p. 522.

19. SAME. Same. Question of doubt as to power to fill vacancies would be resolved in favor of the power.

If the question was one of doubt about the power of the comptroller, secretary of State, and treasurer to fill vacancies in the offices of the members of the State board of elections occurring during a session of the legislature and left unfilled by that body, public policy and the effective administration of the law would require the doubt to be resolved in favor of the power to appoint. (*Post*, p. 564.)

Acts cited and construed: Acts 1909, ch. 103, sec. 3.

20. CONSTITUTIONAL LAW. Concurrent passage of two distinct legislative bills upon their second reading does not invalidate them.

While the passage of a bill in the house of representatives upon a second reading, concurrently with another bill relating to a different subject, would be contrary to good parliamentary procedure and should not be done upon objection made, yet this alone will not authorize the courts to hold such reading and passage to be nugatory, so as to invalidate the act. (*Post*, p. 566.)

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Acts cited and construed: Acts 1909, ch. 103.

Constitution cited and construed: Art. 2, sec. 18.

21. **SAME. Same.** Journal entry that is not conclusive that two bills were voted upon at the same time.

A journal entry reciting that it was "moved that house bills 340 and 341 be passed upon second reading and referred to committee on elections," where another entry shows that this motion prevailed by a constitutional majority, is not conclusive evidence that the two bills were voted upon at the same time. (*Post*, pp. 565, 566, 567.)

Acts cited and construed: Acts 1909, ch. 103.

Constitution cited and construed: Art. 2, sec. 18.

Case cited and approved: *Nelson v. Haywood Co.*, 91 Tenn., 605.

22. **SAME. Same. Same.** Presumption in favor of regularity of passage of acts, where journal entries do not affirmatively show noncompliance with constitution.

Every reasonable inference and presumption will be drawn and indulged in favor of the regularity of the enactment of a statute, signed by the speakers of both houses and approved by the governor, or otherwise passed, that is, afterwards passed over the veto of the governor, if the bill was disapproved by him; and where the journal of the house of representatives recited that two bills, which related to different subjects, were passed upon their second reading at the same time, it will be presumed that the recital was an inaccurate statement of the clerk, or a clerical error, or that the bill in question, which was signed by the speakers of both houses and finally enacted as a law, was subsequently lawfully passed upon its second reading; for it does not affirmatively appear from said recital in the journal that the constitutional requirement was not complied with, as such recital was not conclusive that the two bills were voted upon at the same time. (*Post*, pp. 567-569.)

Acts cited and construed: Acts 1909, ch. 103.

Constitution cited and construed: Art. 2, sec. 18.

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Cases cited and approved: *State v. McConnell*, 3 Lea, 341; *Williams v. State*, 6 Lea, 553; *State v. Algood*, 87 Tenn., 167; *Nelson v. Haywood Co.*, 91 Tenn., 605; *State v. Swiggert*, 118 Tenn., 562.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

J. C. BRADFORD, J. J. VERTREES, W. O. VERTREES, and
D. B. PURYEAR, for complainants.

ATTORNEY-GENERAL CATES, PITTS & M'CONNICO, LUKE
LEA, J. N. FISHER, and O. K. HOLLADAY, for defend-
ants.

MR. JUSTICE SHIELDS delivered the opinion of the
Court.

E. R. Richardson, N. G. Robertson, and F. A. Raht,
claiming to be the members of the state board of elec-
tions created by the general assembly by chapter 435,
Acts 1907, and as citizens and taxpayers, bring this bill
against S. M. Young, I. B. Tigrett, and James Maynard,
who also claim to be members of the state board of elec-
tions by election and appointment under the provisions
of chapter 103, Acts 1909, an act amending chapter 435,

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Acts 1907, for the purpose of asserting their title to the offices of members of the state board of elections, and their right to exercise the powers and duties, and receive and enjoy the emoluments, of the offices, and to enjoin the defendants from interfering with and obstructing them therein, and drawing from the treasurer of the State the salaries and expenses allowed the board, upon the ground that the latter act (chapter 103, Acts of 1909) is unconstitutional and void, or, if mistaken in this, that the defendants were never lawfully elected or appointed, and therefore complainants are entitled to hold the offices until their successors are elected or appointed.

The act of the general assembly creating the first state board of elections was passed April 9, 1907.

Section 1 of this act provides that there shall be appointed by the governor, and confirmed by the senate, a board of three persons, to be known as the "State Board of Elections," which shall have and exercise all powers now conferred upon the governor to appoint commissioners of elections and registration.

Section 2 provides that not more than two of the three members of the board "shall be of the same political party, and that both the representatives of the majority and minority parties shall be *bona fide* members of the party they are appointed to represent," and that two members shall constitute a quorum for the transaction of business.

Section 3 prescribes the time of the appointments of the members of the board.

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Section 4 provides that the members of the board first appointed shall hold office until the first Monday in March, 1909, and thereafter their successors for two years, and until their successors are appointed; all vacancies to be filled as in the first instance, except when occurring while the legislature is not in session, and then by the governor, to hold until the convening of the legislature.

Section 5 fixes the compensation of the members of the board, prescribes the oath they shall take, and requires them to qualify within 10 days after appointment.

Sections 6 and 7 provide for the expenses of the board, and meetings to be held by them for the transaction of business.

Section 8 is in these words: "Be it further enacted, that said state board of elections shall select and appoint on the second Monday in May, 1907, or as soon thereafter as practicable, and on the second Monday in May every two years thereafter, three commissioners of election for each county in the State: provided, that no more than two of said commissioners shall be of the same political party; and, provided further, that the state board of elections shall have the power to remove any commissioners of elections for cause or failure to perform their duties; and said state board of elections shall likewise fill by appointment all vacancies occurring in the county board of commissioners of election."

Sections 9 and 10 require the board of elections to

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issue commissions to the county commissioners of election and to keep certain records of their proceedings.

Section 11 repeals all laws in conflict with the act.

Complainants were duly appointed by the governor and confirmed by the senate, and were exercising the powers and discharging the duties of the state board of elections, when an amendatory act was enacted, and the defendants appointed thereunder.

The amendatory act (chapter 103, Acts 1909) was passed February 12, 1909, and is entitled:

"An act to amend an act entitled, 'An act to create a state board of elections, to provide for the manner of their appointment, their terms of office, their compensation, and to define their duties and powers,' passed April 9, 1907, and being chapter 435 of the printed Acts of 1907."

Section 1 of this act amends section 1 of the original act, so that it shall read: "That there shall be elected by the joint vote of both houses of the general assembly a board of three persons to be known as 'the State Board of Elections,' which shall have and exercise all the powers conferred upon said board by the Acts of 1907, chap. 435, entitled as set out in the caption hereof."

Section 2 amends section 3 of the original act, so as to provide:

"That the members of the first state board of elections shall be elected prior to the first Monday of April, 1909, upon a day to be fixed by joint resolution of the

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general assembly, and thereafter during each biennial session of the general assembly one member of such board shall be elected on such date prior to the first Monday of April as may be fixed by joint resolution of both houses of the general assembly."

Section 3 amends section 4 of the original act, so as to provide:

"That the term of the office of the members of the state board of elections first elected as hereinbefore provided shall be for two (2), four (4) and six (6) years, respectively, from the first day of April, 1909. The terms of each member of the first board shall be fixed when he is elected by the joint vote of the general assembly, as hereinbefore provided, and thereafter the term of the member elected at each recurring biennial session of the general assembly shall be for six (6) years from the first Monday of April succeeding his election. All members of said state board of elections shall continue in office until their successors are elected and qualified, and all elections of successors to the first board, or to fill vacancies in that or any subsequent board, shall be *bona fide* members of the same party to which the member whose successor is to be elected or the member causing the vacancy belonged. All vacancies shall be filled as in the first instance by joint vote of the general assembly, except vacancies occurring when the general assembly is not in session, when, if the office of only one member is vacant, an appointment to fill such vacancy shall be made by the remaining

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members of the board within thirty (30) days after the vacancy occurs; and, provided, further, that in the event the remaining commissioners fail to fill the appointment within the time mentioned, the same shall be filled by the secretary of State, comptroller, and treasurer, or a majority from the same party in which the vacancy occurred, to hold until the convening of the general assembly; but if there be more than one vacancy on said board, the same shall be filled by appointment of the secretary of State, comptroller, and treasurer, or a majority of those officers."

Section 4 amends section 8 of the original act, so as to provide:

"That said State board of elections shall elect and appoint on the second Monday in May, 1909, or as soon thereafter as practicable, and on the second Monday in May every two years thereafter, three (3) commissioners of elections from each county of the State; provided, that not more than two of said commissioners shall be of the same political party, and that the representatives of the majority and minority parties shall be *bona fide* members of the party they are appointed to represent, and any two members of said board shall constitute a quorum for the transaction of business; that each member of the state board of elections herein provided for shall have the right and power to designate and appoint without the consent of his associates, one of said commissioners of elections in said county; and, provided, further, that said state board of elections

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shall have full power to remove any commissioner of elections for cause or failure to perform his duties, and the vacancy thereby caused shall be filled by that member of the State board of elections who in the first instance appointed the commissioner so removed.

“By, minority party is meant the party polling in the State of Tennessee the second highest number of votes for presidential electors at any presidential election immediately preceding the appointment of officers under the act.”

Section 5 provides that the act shall take effect from and after its passage, the public welfare requiring it.

The defendants, Young, Tigrett, and Maynard, were elected members of the State board of elections by the members of the general assembly in joint convention, and, after this suit was brought, were appointed by the secretary of State, comptroller, and treasurer, that all questions arising under this act might be settled herein, but the legality of their election and appointment is challenged for causes which will be hereafter stated, and were, when this bill was filed, exercising the powers and duties of the State board of elections, as defined in the original and amendatory acts.

The general assembly had two separate and distinct purposes in view in enacting the amendatory act.

The first of these was to change the manner of choosing the members of the State board of elections, and the second, to more effectually secure to the minority party *bona fide* representation in the appointment of election officers in this State.

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These purposes were sought to be effected by amending different sections of the original act, and the several amendments are assailed as contravening different provisions of the constitution, and must necessarily be treated separately.

We will first consider and dispose of the objections made to the amendment of the first section of the original act, taking from the governor the power of appointing the State board of elections, and providing that the members of it shall be elected by a joint vote of both houses of the general assembly, and for the filling of vacancies that may happen when that body is not in session.

Complainants' contention, tersely stated, is that the power of appointment to office is an executive function, and falls within the powers committed by the constitution to the executive department, and therefore the amendment vesting the authority to elect the State board of elections in the members of the general assembly violates the provisions of the constitution distributing the powers of government.

The constitutional provisions referred to, are as follows:

"The powers of government shall be divided into three distinct departments: The legislative, executive, and judicial.

"No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted." Article 2, secs. 1, 2.

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"The legislative authority of this State shall be vested in a general assembly, which shall consist of a senate and a house of representatives, both dependent upon the people." Article 2, sec. 3.

"The supreme executive power of this State shall be vested in the governor." Article 3, sec. 1.

"The judicial power of this State shall be vested in one supreme court, and any such circuit, chancery, and other inferior courts as the legislature shall, from time to time, ordain and establish; in the judges thereof and in the justices of the peace." Article 6, sec. 1.

The constitution of this State adopted in 1834, contained these same provisions. That adopted in 1796 provided for the same separation of the powers of government, but did not contain the express prohibition against one department exercising the powers or functions of the others.

Similar provisions are found in the constitution of the United States, and the constitutions of all the States, and they have been held essential to the republican form of government guaranteed to the States by the constitution of the United States. They vest the powers of government in three distinct, independent, and co-ordinate departments, legislative, executive, and judicial, with express prohibition against any encroachment by one upon the powers and prerogatives of the other, except as directed or permitted by some other provision of the constitution.

Concerning their meaning, in a broad sense, and their importance, this court has said:

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“In the theory of our government, all sovereignty is inherent in the people. The constitution of this State so expressly declares. It further declares (article 2, sec. 1) that, ‘the powers of government shall be divided in the three distinct departments, the legislative, executive, and judicial,’ and (section 2) that no one of these departments ‘shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.’ Thus each department is limited within its own appropriate sphere. To each has been delegated by the people—whose agents they are—such portion of sovereignty as was deemed expedient. On the one hand, neither can assume the exercise of any of the powers conferred upon either of the others; nor, on the other, can either divest itself—by transfer to another department, or other subagent—of any portion of the power expressly confided to its own exercise, except in virtue of its explicit authority to that effect given by the constitution itself.” *State v. Armstrong*, 3 Sneed, 634.

And again:

“It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the constitution (article 2, secs. 1 and 2). The most responsible duty devolving upon this court is to see that this injunction of the constitution shall be faithfully observed. We have no right to go outside of the

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statutes presented for our examination and adjudication, to look into the motives for their enactment. We are to confine ourselves to the provisions of the statute itself, and in our decisions we are to presume that the legislature not only acted upon considerations of public good, but that they acted within the sphere of their legitimate powers. Conceding all this, we are bound, on the other hand, whenever in our deliberate judgment these legitimate powers have been transcended, to interpose for the protection and preservation of the constitution." *Mabry v. Baxter*, 11 Heisk., 682-689.

The constitution does not define in express terms what are legislative, executive, or judicial powers.

Theoretically, the legislative power is the authority to make, order, and repeal; the executive, that to administer and enforce; and the judicial, that to interpret and apply, laws.

In the writings of Montesquieu, and other political scientists, much consulted when the first American constitutions were framed and adopted, it is said, in substance, that the absolute separation of the legislative, executive, and judicial departments was essential to a republican form of government, and necessary for the perpetuation and maintenance of the political liberties of the people. But the framers of the federal constitution, and those of a great majority, if not all, of the States, including Tennessee, notwithstanding the objections of some of the ablest statesmen of that day,

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departed from this theoretical division of the powers of government, and in many important matters vested in each of them powers and authority that in strictness would belong exclusively to the others; and in some instances all departments are vested with the same power, to be exercised concerning different matters, and this is especially noticeable in the vestiture of political powers. This is obvious from an examination of those several instruments, and has been frequently referred to in judicial decisions.

In *Crane v. Meginnis*, 1 Gill & J. (Md.), 476, 19 Am. Dec., 241, it is said:

"In whatever terms they have adopted it, in none of these constitutions are the several departments kept wholly separate and unmixed. In some of them, as in the constitution of this State, the executive is appointed by the legislature, and the judiciary by the executive; and in others blended and mingled together."

In *Baltimore v. State*, 15 Md., 457, 74 Am. Dec., 579, it is said:

"This article is not to be interpreted as enjoining a complete separation between these several departments. Practically it has never been so in any of the states in whose fundamental law the principle has been asserted. There are numerous instances to show that it has not been so regarded in this State, for our statute books contain, time and again, laws affording relief where the judiciary possessed ample jurisdiction over the subject-matter. How this kind of legislation

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came to be introduced, it is useless now to inquire. It commenced soon after the adoption of the constitution, probably participated in by some of the framers of that instrument, and has been continued ever since."

There are also some powers which, on account of the complexity of governmental functions, are difficult to classify, and may be, with equal propriety and correctness, committed to more than one department.

Judge Cooley, in his *Constitutional Limitations*, p. 157, says:

"It is difficult to point out the precise boundary which separates legislative from judicial. It is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty."

In *Hovey v. State*, 119 Ind., 395, 21 N. E., 21, it is said:

"The boundaries which separate the functions of the different departments are broad, clear, and distinct, as applied to matters affecting property rights or private concern, or the execution or enforcement of existing law; but it is not easy, where the constitution is silent, to discriminate or formulate definitions as to what constitutes legislative, executive, and judicial authority, when questions of public policy, or which relate to the best means and agencies for accomplishing a governmental end, or of executing the law, are involved."

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In *Fox v. McDonald*, 101 Ala., 51, 13 South., 416, 21 L. R. A., 529, 46 Am. St. Rep., 98, Head, J., speaking for the court, says:

"There are many acts possessing a legislative, executive, or judicial character, especially peculiar to the very nature of our system, and necessarily inherent in it, which time out of mind have not been exclusively exercised by these departments, and which, for the ease and efficiency of our system, could not be so exercised."

And again he says:

"There are functions which are often performed by one of these departments of such a character that their performance does not necessarily belong to it, and where such is the case the authority of the department is not necessarily exclusive, and other departments may be required to perform the same or a similar function."

All sovereign power, under our form of government, is vested in the people. The chief executive has no prerogative powers, as in monarchical governments, but only such as are vested in him by the fundamental law. The constitutions of the original States, first adopted, vested most of the appointing power in the legislative department, and very little of importance in the chief executive, doubtless guarding against its abuse, from which they had recently suffered under the government of England. In the constitutions of all the States, the most important part of it has been generally vested in the people, to be exercised in popular elections, and the

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remainder in unequal proportions in all three of the departments, much more, as a rule, in the legislative than the others, and often less in the executive than the judicial.

Whatever may have been its nature theoretically, in practical application in this country, this power has not been considered as belonging to either of the departments, or any general rule observed in vesting it. It will hardly be found vested in the same way in the fundamental law of any two of the States. In every case involving the right of its exercise by a particular department, courts are necessarily to be governed by the special provisions of the constitution of the State where the question arises. We think, from a general review of the authorities, that it is now established that under the American form of government the power of election or appointment to office is a political power, not inherently legislative, executive, or judicial, but which may be vested with equal propriety in either of them, and that it is so treated and applied in a majority of the States.

There is some conflict in judicial opinion upon this question, resulting generally from the differences in the fundamental law of the several States; but we think our conclusions are supported by the weight of authority, especially by the decisions of the courts of the States which have constitutional provisions concerning the appointing power identical or similar to those of this State.

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Among other cases are those of *People v. Langdon*, 8 Cal., 16; *People v. Morgan*, 90 Ill., 558; *Baltimore v. State*, 15 Md., 376, 74 Am. Dec., 572; *Overshiner v. State*, 156 Ind., 187, 59 N. E., 468, 51 L. R. A., 748, 83 Am. St. Rep., 187; *People v. Freeman*, 80 Cal., 233, 22 Pac., 173, 13 Am. St. Rep., 122; *Cox v. State*, 72 Ark., 97, 78 S. W., 756, 105 Am. St. Rep., 17; *Americus v. Perry*, 114 Ga., 881, 40 S. E., 1004, 57 L. R. A., 230; *People v. Hurlbut*, 24 Mich., 63, 9 Am. Rep., 103; *Atty. Gen. v. Bolger*, 128 Mich., 355, 87 N. W., 366; *State v. Irwin*, 5 Nev., 111; *Sturgis v. Spofford*, 45 N. Y., 446; *Rogers v. Buffalo*, 123 N. Y., 173, 25 N. E., 274, 9 L. R. A., 579; *People v. Bennett*, 54 Barb. (N. Y.), 481; *State v. George*, 22 Or., 142, 29 Pac., 356, 16 L. R. A., 737, 29 Am. St. Rep., 586; *Biggs v. McBride*, 17 Or., 648, 21 Pac., 878, 5 L. R. A., 115; *Fox v. McDonald*, 101 Ala., 51, 13 South., 416, 21 L. R. A., 529, 46 Am. St. Rep., 98; *Ex parte Siebold*, 100 U. S., 371, 25 L. Ed., 717; *Cherry v. Burns*, 124 N. C., 761, 33 S. E., 136; *Cunningham v. Sprinkle*, 124 N. C., 642, 33 S. E., 138; *State v. Seymour*, 35 N. J. Law, 54; *Hovey v. State*, 119 Ind., 401, 21 N. E., 21; *Ex parte Gerino*, 143 Cal., 414, 77 Pac., 166, 66 L. R. A., 249; *State v. Rosenstock*, 11 Nev., 128; *Sinking Fund Com'rs v. George*, 104 Ky., 260, 47 S. W., 779, 84 Am. St. Rep., 454.

We will quote from only a few of these cases. In *People v. Langdon*, *supra*, it is said:

"The power to fill any office is political, and the power is exercised in common by the legislatures, the

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governors, and other executive officers of every State in the Union, unless it has been expressly withdrawn by the organic law of the State. That it has not been by our constitution there can be no doubt: First, because there is no clause that would warrant such a construction; and, second, because there are several that would forbid it.

"It would be useless to pursue this argument further. This power has always been exercised by the legislature, and never before denied. It is not prohibited by the constitution, and according to the theory and spirit of our institutions, is safer when exercised by the immediate representatives of the people than when lodged in the hands of the executive."

In *People v. Morgan*, *supra*, the court said:

"The executive power in the State is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. The instrumentalities employed for that purpose are officers, elected or appointed, who are charged with the enforcement of the law. But the power to appoint is by no means an executive function, unless made so by the organic law or legislative enactment; and in this case it is not so unless the power is thus conferred. If it were conceded that these appointments were the exercise of political power, would it necessarily be violative of any provision of the constitution? The division and allotment of powers are not into political, executive, and judicial, but into legislative, executive, and judicial.

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It was no doubt the exercise of political power, as that embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other. Political power is the policy of government or its administration, and may be exercised either in the formation or administration of government, or both. Hence it follows that, if it be a political power, that of itself in no wise militates against its exercise by a person belonging to the judicial department of the government."

In the case of *Baltimore v. State*, supra, it is said:

"It is contended that, the power of appointment being an intrinsic executive function, the naming of the commissioners in the law was in violation of the sixth article of the declaration of rights: 'That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other, and no person exercising the functions of one of the said departments shall assume or discharge the duties of the other.'

"We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense of which we understand the position to have been taken, viz., that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government, it may be so regarded; but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and foundation of government, ex-

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erting their will after the manner and by instrumentalities specially provided in the constitution."

In the case of *Overshiner v. State*, supra, the court said:

"We concede in fullest terms appellant's contention that our state government is composed of three distinct and co-ordinate branches, viz., the legislative, executive (including the administrative), and judicial, and that the powers that are committed by the people to one branch cannot be exercised by those performing duties in another without express authority to do so, or the exercise of such powers becomes essential or appropriate to the effective discharge of the duties imposed upon such branch. And while it has been many times decided by this and other courts that, as a general rule, the power of appointment to office is an appropriate executive prerogative, yet, as said by Mitchell, J., in *Hovey v. State*, 119 Ind., 401, 21 N. E., 21: 'It is a fundamental error, however, to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the executive.' In the distribution of governmental power the people had the undoubted right to lodge any part of it where it pleased them, and, when expressly placed, the court will suffer no encroachment upon it by those acting in another department; but where the constitution is silent, and the question is one of public policy, or relates to the best means or agency for the attainment of some governmental end, it must be presumed that

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the framers of the constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and beneficial to the public."

In *Cox v. State*, supra, this is said:

"First, as to the power of the legislature to make appointments to office: In the United States the general power to appoint officers is not inherent in the executive or in any other branch of the government. It is a prerogative of the people, to be exercised by them or that department of the State to which it has been confided by the constitution. The legislature has, we think, power to make appointments to office, unless its powers in that respect are restricted by the constitution, either expressly or by implication."

Cases cited by complainants as sustaining their position that the appointing power is inherently an executive function, belonging to the executive, are *State v. Kennon*, 7 Ohio St., 546; *State v. Stanley*, 66 N. C., 59, 8 Am. Rep., 488; *People v. Bledsoe*, 68 N. C., 457; *State v. Offill*, 74 Neb., 669, 105 N. W., 1099; *State v. Hocker*, 39 Fla., 477, 22 South., 721, 63 Am. St. Rep., 174; *State v. Barbour*, 53 Conn., 76, 22 Atl., 686, 55 Am. Rep., 65; *State v. Denny*, 118 Ind., 449, 21 N. E., 274, 4 L. R. A., 65; *Evansville v. Indiana*, 118 Ind., 426, 21 N. E., 267, 4 L. R. A., 93; *Jameson v. Denny*, 118 Ind., 382, 21 N. E., 252, 4 L. R. A., 79; *Pratt v. Breckinridge*, 112 Ky., 12, 65 S. W., 136, 66 S. W., 405; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.), 401; *State v.*

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Washburn, 167 Mo., 680, 67 S. W., 592, 90 Am. St. Rep., 430.

The Ohio and North Carolina cases are not authority here, because the constitutions of those States, when these decisions were made, absolutely prohibited the legislature from exercising any appointing power.

After the North Carolina cases were decided, the constitution of that State was amended so as to eliminate the prohibitory clause, and under a provision similar to article 7, section 4, of the constitution of Tennessee, it was held that the general assembly could exercise the power directed. *Cherry v. Burns*, 124 N. C., 761, 33 S. E., 136; *Cunningham v. Sprinkle*, 124 N. C., 642, 33 S. E., 138.

The Florida case is not in point, as the constitution of that State committed the appointing power to the people and the governor, when not otherwise expressly vested in that instrument.

The cases of *Taylor v. Commonwealth* and *State v. Barbour*, supra, while stating abstractly that the power is an executive function, do not really involve the question here presented.

The Indiana cases cited do support complainants' position; but the contrary seems to have been held in *Hovey v. State*, 119 Ind., 395, 21 N. E., 21, and *Overshiner v. State*, 156 Ind., 187, 59 N. E., 468, 51 L. R. A., 748, 83 Am. St. Rep., 187, from which we have quoted.

The cases of *State v. Washburn* and *Pratt v. Breckinridge*, supra, fully sustain complainants; but, so far

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as our investigations have extended, the courts of Missouri and Kentucky stand alone in adhering strictly to the doctrine of the exclusive right of the executive to exercise the appointing power, in the absence of constitutional provisions vesting it otherwise. We do not think it is necessary, in the view we have taken of the question, to review these cases.

The constitution provides for the filling of offices created by it by election by the people, or appointment by some authority therein named, and as to these there can be no controversy. The contention here concerns offices which are created by the general assembly in the exercise of its inherent power to do so, as the welfare of the State may from time to time require.

Complainants do not claim there is any provision of the constitution which expressly vests the power of appointment to these offices in the governor, and there is none. The only provision contained in the constitution upon this subject is article 7, section 4, which ordains:

"The election of all officers and the filling of all vacancies not otherwise directed or provided by this constitution shall be made in such manner as the legislature shall direct."

The question then presented is whether, under the constitution of Tennessee, the filling of an office created by the general assembly, and not made elective by the people, is an executive function, which the governor has the exclusive power to exercise under article

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3, section 1, of the constitution, vesting the supreme executive power of this State in the governor; or may the general assembly exercise it, directly or indirectly, or confer it upon some other authority, under article 7, section 4, of that instrument?

These questions must be determined upon the provisions of the constitution of this State, and the construction they have received by those whose duty it has been to execute them. The decisions of the courts of other States, having similar constitutional provisions, will also, when the question is not clear, be of assistance. Abstract propositions of the theoretical division and nature of the powers of government can only be resorted to when the constitution is silent.

We will briefly review the constitutional history of this State concerning the vestiture and exercise of the appointing power, before examining the provisions of our present constitution upon this subject.

Tennessee was largely settled by immigrants from Virginia and North Carolina, and they doubtless came with favorable impressions of the constitutions which had been recently adopted in those States, and were controlled more or less by them in framing the organic law of this State.

The constitutions of those States, adopted in 1776, although the powers of government were separated into three distinct departments, legislative, executive, and judicial, and each prohibited from exercising the powers properly belonging to the others, vested in the

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general assembly the power to elect all their important officers, including the governor, judges of all the courts, attorneys-general, secretary of State, treasurer, and gave the governor very little appointing power. These constitutions remained in force well up into the next century.

The constitution of Tennessee, adopted in 1796, in many of its provisions, especially those in regard to filling public offices, closely followed those of Virginia and North Carolina. The governor, members of the general assembly, and most of the militia officers were required to be elected by the people. The general assembly was empowered to appoint judges of the civil courts of law and equity, attorneys for the State, and "all officers not otherwise directed by this constitution;" courts to appoint their clerks; and county courts to appoint sheriffs, coroners, trustees, registers, rangers, and constables.

The appointing power of the governor was confined to the appointment of an adjutant general, and filling vacancies occurring during recess in constitutional offices appointed by the general assembly, by granting temporary commissions, to expire at the end of the next session of the legislature. Const. 1796, art. 1, sec. 1; article 2, sec. 1; article 5, sec. 2; article 6, sec. 3.

The governor, under this constitution, could not be authorized by statute to make a temporary appointment to an office filled by the legislature. *Smith v. Normant*, 5 Yerg., 271.

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The constitution of 1834 provided that the governor, members of the general assembly, clerks of the courts other than those of the supreme court and chancery court, sheriffs, trustees, and registers should be elected by the people; that the judges of the supreme court and all inferior courts, the secretary of state, and the treasurer should be appointed, and that the attorneys of the State be elected by the joint vote of both houses of the general assembly; that the judges of the supreme court and chancellors should appoint their clerks; that the justices of the peace should elect coroners and rangers; and "that the election of all officers and the filling of all vacancies that might happen by death, resignation, or removal, and not otherwise directed or provided for by this constitution, shall be made in such manner as the legislature shall direct."

The general assembly was also authorized to make provision by general laws for the appointment of special judges, where the regular judges of the courts were unable to attend on account of sickness. Vacancies in the offices of clerks elected by the people were to be filled by the courts, and those of sheriff, trustee, and register by the justices of the county.

The only appointing power vested in the governor was that to appoint an adjutant general and his other staff officers, and to temporarily fill vacancies in constitutional offices, as in the constitution of 1796. Const. 1834, art. 2, sec. 3; article 3, secs. 2, 13, 17; article 6, secs. 3, 4, 5, 11, 13; article 7, secs. 1, 2, 3, 4; article 8, sec. 2.

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The chief differences in the constitution of 1796 and this, in relation to the appointing power, are the provisions for the election of some of the county officers and the change of the clause authorizing the "legislature to appoint all officers not otherwise directed by the constitution," so as to read as above stated, and conferring upon the legislature the authority to provide by general laws for the appointment of special judges. The only increase in the power of the governor was that to appoint his staff officers.

This constitution was amended in 1853, so as to provide that judges, the attorney-general, and district attorneys should be elected by the people, which was a further assumption of sovereignty by the people, but no increase of the power of the executive.

In the interval between the adoption of the constitution of 1834 and that of 1870, the successive general assemblies, construing article 7, section 4, providing that the election of all officers and the filling of all vacancies not otherwise directed or provided for by the constitution should be made in such manner as the legislature should direct, as an extension, not as a limitation, of the power of appointment to new offices created by statute, continued to elect statutory officers, and to create others, either filling them in the act, or conferring the power to do so upon their members in joint session, the governor, and other officers of the State, counties, and municipalities, in their discretion.

Among other offices created by statute and filled by

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the general assembly in the act creating them, or by the members in joint session, we call attention to the following:

Comptroller of the treasury, to be elected by the general assembly, which was done at every session until 1870, under act creating the office. Acts 1835-36, c. 12.

State superintendent of public instruction, appointed in the act creating the office. Acts 1835-36, c. 23.

Commissioners for the hospital for the insane. Acts 1837-38, c. 128.

Professor of mineralogy, geology, and chemistry in the university of Nashville, and assayer for the State, appointed in the act. Acts 1837-38, c. 142.

A board of commissioners for the improvement of the navigation of rivers in Tennessee east of Knoxville, to be appointed by the general assembly. Acts 1837-38, c. 236.

Return J. Meigs and William F. Cooper appointed to digest the general statutes of the State. Acts 1851-52, joint resolution No. 26.

Return J. Meigs appointed State librarian, to hold his office at the pleasure of the general assembly. Acts 1855-56, c. 152.

Return J. Meigs and William F. Cooper appointed by statute to superintend the printing of the Code of Tennessee. Acts 1857-58, c. 177.

Code of 1858, which was prepared by Return J. Meigs and William F. Cooper, authorized the general assembly, by joint vote of both houses, to elect a State

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geologist and mineralogist (sections 253 and 254); common school commissioners (section 963); public printer of the State (section 1), which was done for many years.

William G. Brownlow and others appointed trustees of east Tennessee university. Acts 1867-68, c. 88.

Turnpike commissioners appointed. Acts 1868-69, c. 24.

E. T. Seay and others appointed commissioners to organize Trousdale county and hold an election for that purpose. Acts 1870, c. 27.

The governor, secretary of State, comptroller, Robert McKinney, Francis B. Fogg, and Archibald Wright appointed commissioners to lease delinquent railroads. Acts 1870, c. 93.

And during that time, the general assembly, by statutes enacted for that purpose, appointed trustees for educational and other institutions of the State, officers of towns and cities, and directors and other officers of numerous private corporations. These officers were recognized by the executive and judicial departments, and there is no evidence that their official authority was ever challenged, or the power of the legislature to enact the laws called in question.

We now come to the constitution under which the amendatory act was passed, that adopted in 1870.

It provides that the governor, members of the general assembly, judges of the supreme court, the circuit and chancery courts, and other inferior courts, dis-

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strict attorneys, clerks of the courts other than those of the supreme and chancery courts, sheriffs, trustees, and registers shall be elected by the qualified voters of the State; that the general assembly shall appoint, by the joint vote of both houses, the secretary of State, treasurer, and comptroller of the treasury; and that "the election of all officers, and the filling of all vacancies, not otherwise directed or provided for by this constitution, shall be made in such manner as the legislature shall direct." The supreme court is authorized to appoint the attorney-general and reporter and its clerks; chancellors are authorized to appoint clerk and masters; and the justices of the counties to elect coroners and rangers and to fill vacancies in the offices of sheriff, trustee, register, and the clerk of the county court.

The governor is authorized to appoint an adjutant general and his other staff officers, and fill certain vacancies, as in former constitutions. Const. 1870, art. 2, sec. 3; article 3, secs. 2, 14; article 6, secs. 3, 4, 5; article 7, secs. 1, 2, 3, 4; article 8, sec. 2.

The general assembly, since the adoption of this constitution, has exercised, without objection from any source, the appointing power, filling existing statutory offices, and others created by it, by joint vote of the two houses, or in the act creating the office, and in other cases conferring the power on the governor and other officers.

Among the officers so elected were the public printer, State librarian, State superintendent of public instruc-

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tion, registers of the land offices, and trustees of public institutions; and some of the acts in which the power was exercised directly, or conferred on others, are the following:

Acts appointing certain citizens, therein named, commissioners to organize the new counties of Crockett, Moore, James, and others, and authorizing them to hold elections for that purpose. Acts 1870-71, c. 16; Acts 1871, cc. 16 and 96.

An act creating an insurance commissioner, and appointing the treasurer *ex officio* commissioner. Acts 1873, c. 23.

An act appointing the governor, secretary of State, comptroller of the treasury, and treasurer a board of commissioners to superintend the completion of the capitol grounds. Acts 1873, c. 37.

An act appointing the governor president of the normal school board. Acts 1875, c. 90.

A resolution appointing H. M. Polk and others trustees of east Tennessee university. Acts 1875, joint resolution No. 53.

An act appointing the secretary of State, comptroller of the treasury, and treasurer, a board of inspectors of the penitentiary. Acts 1883, c. 171.

An act appointing John M. Lea and others commissioners to superintend the construction of the West Tennessee Hospital for the Insane. Acts 1885, c. 74.

An act appointing William E. Tilson, Frank H. Hanum, and David White commissioners on the part of

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Tennessee to fix the line between this State and North Carolina. Acts 1885, c. 80.

An act appointing the comptroller of the treasury, attorney-general of the State, and three ex-Confederate soldiers, to be suggested by the Tennessee division of Confederate veterans, commissioned by the governor, a board of pension examiners. Acts 1891, c. 64.

An act creating a State board of railroad assessors, providing that they shall be elected by the general assembly. Acts 1895, c. 121.

An act creating a state text-book commission, and appointing the governor, State superintendent of public instruction, together with three members of the State board of education, to be named by the governor, to select and adopt a uniform series or system of text-books. Acts 1899, c. 205.

An act creating a state library commission, and appointing the governor, the chief justice of the supreme court, and attorney-general, commissioners, with power to elect or choose a librarian for the State. Acts 1901, c. 52.

An act creating a State board of entomology, constituting as members thereof the commissioner of agriculture, the State entomologist, and plant pathologist. Acts 1905, c. 466.

An act appointing a committee to locate a horticultural and experiment station in West Tennessee, naming the governor a member, and authorizing him to appoint two others. Acts 1907, c. 86.

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An act creating a bureau, to be known as the "State geological survey," which shall be under the direction of a commission to be known as "the State geological commission," composed of the governor, the State commissioner of agriculture, the State mine inspector, the president of the University of Tennessee, the chancellor of Vanderbilt University, and the vice chancellor of the University of the South. Acts 1909, c. 569.

While the governor has, for many years since the constitution of 1834, had the power of appointment to many offices created by the general assembly, in every case it has been conferred by statute, and in all important offices divided with the senate.

After a careful consideration of the provisions of the present constitution, and the constitutional history of the State, we are unable to find any warrant or support for the contention that the power of appointment to office is an executive function which falls to the governor under the provisions distributing the powers of government and vesting in him the supreme executive power.

The constitution commits the power of appointment of certain constitutional officers to each of the departments. The legislature is vested with the most important appointive power not reserved to the people; the courts with that next in order of importance; and that of the executive is confined to the appointment of an adjutant general and his staff officers, and filling temporarily certain vacancies. The election of all officers

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and filling all vacancies, not expressly provided for, is committed to the legislature, to be exercised as it may direct. The whole appointive power is thus expressly disposed of, and there is nothing left for implication or construction.

The provisions of the former constitutions, in this respect, were substantially the same, the only material difference being that under them the legislature was vested with much more power of appointment. The legislature, under the broad powers given it in the first constitution, and those vested in it by article 7, section 4, of the last two constitutions, has always exercised the power of appointment to office created by statute, or conferred it upon the people, the courts, the governor, and others, as it deemed best. The governor has accepted and exercised the power of appointment when conferred upon him absolutely, or jointly with the senate. There is not only an utter absence in the constitution and the constitutional and legislative history of this State of anything that indicates that the power of appointment was considered an executive function, or that it was intended, except where expressly stated, to be vested in the governor. On the contrary, there is much to show that the framers of our organic law did not so treat it, or intend to so vest it. We have no difficulty in coming to the conclusion that this power, under the constitution of this State, is not an executive function, inherently in the executive department when not otherwise expressly vested, but

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a political power, which, consistently with the distribution of powers of government, may properly be vested in either the legislative, executive, or judicial departments by the general assembly.

This conclusion also disposes of the further insistence that the general assembly cannot empower its members to fill a statutory office.

The power being, as we have held, political, and not executive, it may be conferred upon either of the departments without violating the constitutional prohibition relied upon.

We are also of the opinion that article 7, section 4, of the constitution, expressly authorizes the legislature to exercise the appointing power by legislative act, or in joint session of the members of the two houses. There is no limitation of the agencies it may employ; and it has been held that, where the constitution authorizes the legislature to direct a thing to be done, upon the principle that the greater power includes the less, it may do the thing to be directed. *Redistricting Cases*, 111 Tenn., 234, 291, 292, 80 S. W., 750; *Luehrman v. Taxing District*, 2 Lea, 440, 444.

The members of the convention that framed the present constitution well knew that the legislature had been exercising the power of appointment to office for thirty-five years, and we must presume that they understood that article 7, section 4, authorized it and intended to continue it, when they placed the same clause in the new constitution in substantially the same

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language, or they would have in some way forbidden it.

Hon. John C. Brown was president of the convention of 1870, and immediately after its adoption held the office of governor for two terms. During his administration the legislature continued to exercise the power as before, and he approved the legislation enacted for that purpose.

This practical and contemporaneous construction of article 7, section 4, covering a period of more than seventy-five years, were the question one of doubt, would, we think, settle it in favor of the validity of the power of the legislature. So well recognized was the authority of the legislature to exercise this power that the governor did not challenge it in vetoing the act here assailed, and approved another act which the general assembly at the same session passed, creating a bureau to be known as the "State Geological Survey," and controlled by the State board of geological commissioners, and appointing the governor, commissioner of agriculture, State mine inspector, the president of the University of Tennessee, chancellor of Vanderbilt University, and vice chancellor of the University of the South, commissioners. Acts 1909, c. 569.

Judge Cooley, upon the weight to be given practical contemporaneous construction of the constitutions of the States, says:

"But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction

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sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

Also, in *Baltimore v. State*, supra, it is said:

"It has also been generally held that contemporaneous interpretation furnishes reliable light as to the meaning of a clause otherwise involved in obscurity or doubt. 'Contemporaneous expositions of doubtful provisions in all instruments, and particularly in legislative enactments and constitutional charters, are held to be legitimate and useful sources of construction.'"

And in *Den v. Hoboken Land Co.*, 18 How., 280, 15 L. Ed., 372, Mr. Justice Curtis says:

"This legislative construction of the constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was 'due process of law.'"

The courts of last resort of other States, construing provisions in the constitutions of those States similar to article 7, section 4, have held that the legislature

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could either exercise the power directly by legislative act or that its members could do so in joint session.

In *Ex parte Gerino*, 143 Cal., 414, 77 Pac., 167, 66 L. R. A., 249, it is said:

"The legislature has power to establish offices in addition to those created by the constitution itself. Section 4 of article 20 provides that ' . . . all officers . . . whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.' This gives the legislature power to declare the manner in which officers other than those provided by the constitution shall be chosen. Such officers may be appointed by the legislature itself, or the duty of appointment may be delegated and imposed upon some other person or body. *People v. Provines*, 34 Cal., 541; *In re Bulger*, 45 Cal., 559. There is no limitation to any particular person or class of persons upon whom alone the legislature may impose this obligation."

In *Americus v. Perry*, 114 Ga., 881, 40 S. E., 1008, 57 L. R. A., 230, Cobb, J., speaking for the court, says:

"While the power to appoint public officers is in a great many instances lodged in some officer of the executive department, this is not now, and never has been, true in reference to all public officers. The history of this State will show that public officers have been chosen by the general assembly and also have been chosen by various judicial officers of the State. This court has, and always has had, the power to appoint

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its own officers, and a similar power is vested in the judges of many inferior tribunals. There is nothing in the legislative or judicial history of this State which would indicate that the power of appointment to office was to be treated as purely executive in its nature. An examination of the acts passed by the general assembly from the earliest history of the State down to the present time will show that in many instances the power to appoint officers has never been vested exclusively in the executive department, but has been from time to time vested in the judicial department, and has been exercised, directly or indirectly, by the legislative department; and there are many instances of legislation where powers apparently belonging to one department have been held properly exercisable by another department, as stated in *Beall v. Beall*, that the separation of the three departments cannot, from the nature of things, be total. If the general assembly may exercise the power to appoint an officer by providing the manner in which such officer shall be chosen, we see no good reason why it cannot exercise this power directly by naming the officer in the act creating the office."

In *People v. Hurlbut*, 24 Mich., 64, 9 Am. Rep., 103, it is said:

"If the legislature had the power to provide the time and manner of the appointment, and were not confined to providing for the appointment by the local authorities, then they had the power to provide that it should be made by the governor with or without the consent

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of the senate, or by the legislature in joint convention, or, finally, by the legislature in the very form and manner which was adopted. And if they had the power to direct that it should be made in this way, it would be very difficult to give any substantial reason why they could not proceed to make the appointment as they did, without first passing an act providing that it should be so made. Such an act would be but a legislative determination that the appointments should be so made; and the actual making of it in this way shows the like legislative determination. A similar exercise of power by the legislature has been upheld by the supreme court of New York. *People v. Bennett*, 54 Barb. [N. Y.] 480."

To the same effect are the cases hereinabove cited on another question, viz.: *People v. Langdon*, 8 Cal., 17; *People v. Freeman*, 80 Cal., 233, 22 Pac., 173, 13 Am. St. Rep., 122; *Atty. Gen. v. Bolger*, 128 Mich., 355, 87 N. W., 366; *Sturgis v. Spofford*, 45 N. Y., 446; *Fox v. McDonald*, 101 Ala., 51, 13 South., 416, 21 L. R. A., 529, 46 Am. St. Rep., 98; *Cunningham v. Sprinkle*, 124 N. C., 642, 33 S. E., 138; *Cherry v. Burns*, 124 N. C., 761, 33 S. E., 136; *Sinking Fund Com'rs v. George*, 104 Ky., 260, 47 S. W., 779, 84 Am. St. Rep., 454; *Cox v. State*, 72 Ark., 97, 78 S. W., 756, 105 Am. St. Rep., 17.

The contrary is held in some of the cases cited by complainants as sustaining their contention that the appointive power is an executive function; but we think we have reached the proper conclusion, and are

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sustained by a majority of the adjudged cases involving this direct question.

Complainants also assail the constitutionality of the amendatory act, upon the ground that sections 3 and 4, amending sections 4 and 8 of the original act (chapter 435, Acts of 1907), requiring the members of the State board of elections and the commissioners of elections for the several counties, to be elected or appointed from the two political parties most numerous represented in this State, and vacancies to be filled from the party to which the former officer belonged, and vesting in the members of the two boards certain powers not given them by the original act, violate article 1, section 4, of the constitution, providing "that no political or religious test, further than an oath to support the constitution of the United States and of this State shall ever be required as a qualification to any office or public trust under this State."

The complainants, upon this record, have no interest in this question, and cannot call for a determination of it, unless, if sustained, the effect would be to render the entire act void. They are not interested in these particular amendments as taxpayers, because no burdens are imposed by them, nor as citizens, since they are not affected in any way not common to all the citizens of the State. *Patton v. Chattanooga*, 108 Tenn., 197, 65 S. W., 414.

We are of opinion that, if these amendments were invalid, the act would be valid as to other matters. The

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amendatory act was enacted for two distinct purposes, sought to be accomplished by amending different sections of the original act. Section 1 amends the same section of the original act, so as to take from the governor the power to appoint the members of the State board of elections, and vest it in the members of the general assembly; while sections 3 and 4 amend sections 4 and 8 of the former act in relation to the persons to be appointed members of the State board and commissioners of elections. The first amendment concerns the appointing power, and the second the appointees. These are separate and independent matters. The object of either amendment can be accomplished without the aid of the other. The change of the appointive power does not affect the character of the person to be appointed. The board will be governed by the provisions of the old act in making appointments if sections 3 and 4 of the last act are invalid.

It is well settled that, where the provisions of a statute are severable and independent, as here, the invalidity of one provision will not vitiate those that are valid.

In *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn., 179, 36 S. W., 1048, 34 L. R. A., 725, Caldwell, J., said:

"It is not every act with unconstitutional provisions that must fail *in toto*. If, notwithstanding and without such provisions, there be left enough for a complete law, capable of enforcement and fairly answering the object of its passage, the courts will reject only the void parts and enforce the residue."

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This principle is well established. *Tillman v. Cocke*, 9 Baxt., 429; *State v. Trewhitt*, 113 Tenn., 561, 82 S. W., 480; *Turnpike Co. v. Telephone Co.*, 118 Tenn., 88, 92, 99 S. W., 373.

The same question arose in the case of *State v. Washburn*, supra, which involved the constitutionality of a statute authorizing the governor of Missouri to appoint election commissioners, containing a provision requiring him to appoint a part of them from a list nominated by a political committee, and while the latter provision was held void the act was sustained.

It is there said:

"The point is advanced that, if the act of 1899 is unconstitutional in the particular named, the whole act is void, and the incumbent had no title to the office. The power attempted to be conferred on the partisan committee is not an essential element in the whole act. Where the part of an act that is unconstitutional does not enter into the life of the act itself, and is not essential to its being, it may be disregarded, and the rest remain in force. That is this case."

Therefore, since the determination of this question would not affect the rights of the parties to this cause, we will, under the rule of courts not to pass upon the constitutionality of a statute, when not required for the decision of the case, refrain from expressing any opinion upon the merits of this contention.

We now come to the assault made by the complainants upon the election of the defendants by the joint

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vote of both houses of the general assembly, and their subsequent appointment by the secretary of State, comptroller, and treasurer. The question here arises whether, since the statute has been held constitutional, the case is resolved into a contested election. If so, the chancery court had no jurisdiction. *Shields v. Davis*, 103 Tenn., 539, 53 S. W., 948. But, as this is not pressed, on account of the importance of the questions involved, we will dispose of them. We will consider the objections to the election first.

Section 1 of the act provides that the members of the State board of elections shall be elected by joint vote of both houses of the general assembly.

Section 2 provides the manner of election in these words:

"That the members of the first State board of elections shall be elected prior to the first Monday of April, 1909, upon a date to be fixed by joint resolution of the general assembly, and thereafter during each biennial session of the general assembly one member of each board shall be elected on such date prior to the first Monday of April as may be fixed by joint resolution of both houses of the general assembly."

Complainants insist that the election of the defendants by the members of the general assembly in joint convention was void, because the day for making the same had not been previously fixed by joint resolution, as provided by this section of the act, and there was not present in the joint session a constitutional quorum of two-thirds of the members of the senate.

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The conceded facts are: That a joint resolution, originating in the senate, fixing February 27, 1909, for the meeting of both houses in the hall of representatives at 10 a. m., for the election of a comptroller, treasurer, secretary of State, members of the State board of elections, and members of boards of primary election commissioners, was adopted by both houses, constitutional quorums being present in each, signed by the speakers of the senate and house, and transmitted to the governor for his consideration, which, on February 26th, he returned with a message in writing disapproving and vetoing the same.

That on the night of February 25th thirteen of the thirty-three senators, for the purpose of defeating the election of members of the State board of elections, left the State, and remained absent until the elections hereinafter stated were made.

That a majority of the members of both the senate and house met in joint session in pursuance of the resolution of February 27, 1909, and adjournments were had from day to day until March 3, 1909, when the joint convention proceeded, without a constitutional quorum of the senate, to elect all the officers mentioned in the resolution. There were then present twenty senators and eighty-four representatives, or one hundred and four senators and representatives of the one hundred and thirty-two members of the general assembly, and the defendants each received seventy-two votes, a majority of the members present and of the general assembly.

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When the joint session was about to proceed to the election, and at all times previous thereto, when proper points of order were made, and persistently insisted upon, that the joint session could not proceed for the want of a valid joint resolution fixing the day, the one passed having been vetoed by the governor and not passed over his veto, and that there was not a constitutional majority of the senate present, they were overruled by the president of the joint session.

Complainants now insist that the election, for these reasons, is void and of no effect.

We are of the opinion that the action of the governor in vetoing the joint resolution did not affect the validity of the election.

The provision in the act that the day of the election be fixed by joint resolution is not mandatory, but merely directory, and all that is necessary is that a time and place for the election be definitely fixed by the two houses of the general assembly. The substance of the requirement is that a certain day and place for the joint convention be agreed upon by the senate and house, and when this has been done a failure to make the agreement in a particular form, or other similar irregularity in assembling, will not defeat an election otherwise valid.

The case of *Winston v. Railroad Co.*, 1 Baxt., 78, involved the validity of an election held for the purpose of authorizing Sumner county to subscribe to the capital stock of a railroad company, which it was in-

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sisted was void because certain things required by the statute had not first been done, this court, in determining whether those requirements were mandatory or directory, said:

"The principle on which courts construe a statute as directory merely, is very well stated by Mr. Cooley (Const. Limit., 77-78): 'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly regarded as mandatory, and if the act is performed, but not in time or in the precise mode indicated, it may be still sufficient, if that which is done accomplishes the substantial purpose of the statute. But the rule presupposes that no negligent words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.' In other words, that the means to the attainment of the end, if in minor particulars be neglected, or not strictly followed, shall not defeat the end, or the result sought by the statute."

In Lewis' Sutherland Statutory Construction, section 610, the rule is stated in these words:

"The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the other is productive

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of serious results. This distinction grows out of a fundamental difference in the nature, importance, and relation to the legislative purpose of the statutes so classified. The statutory provisions which may thus be departed from with impunity, without affecting the validity of statutory proceedings, are usually those which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act."

It is further said by this same author (section 612):

"Provisions regulating the duty of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterward. In other words, as the cases universally hold, a statute specifying the time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer. And it was accordingly held that a brigade order, constituting a court-martial, issued in July, when by the militia law it was made the duty of the commandant of the brigade to issue such order on or before the 1st day of June in every year, was valid. A provision that an appeal bond be executed before an appeal is perfected, when not a part of the essential steps to take an appeal, is di-

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rectory. So is a provision that an officer shall take his official oath within a certain period, or give his official bond, even where the issue of a commission to him is prohibited until such bond is given; for it would be attended with mischievous consequences if in such cases all the official acts of such delinquent were held void. His acts, if he in fact filled the office, would doubtless be valid. There would be no collateral inquiries affecting the right of a *de facto* officer to act. A statute which provides that commissioners to locate a county seat shall meet at a time and place provided for, that a majority shall constitute a quorum to do business, 'and that the commissioners may adjourn to some other place or time, and may adjourn from time to time until the business before them may be completed,' is directory merely, and the commissioners have the power to elect a chairman and empower him to fix the time of the next meeting."

In *Covington's Case*, 29 Ohio St., 117, it is said:

"The difference between a mandatory and a directory provision is often determined on grounds of expediency; the reason of this being that less injury results to the general public by disregarding than by enforcing the letter of the law."

As already said, the substance of the requirement of the statute is that an election be made by the joint vote of the general assembly—that is, in joint convention of the members of the two houses—and that the time and place for such convention be fixed so that all members

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can be present, and there can be no advantage taken of any one. The provision for the manner in which the day is to be fixed is merely for the proper and orderly conduct of the business, and the form of the agreement to act cannot possibly affect the election, or the right of any one interested in it. The general assembly did not intend to give the governor any control over the election; but, on the contrary, the amendatory act had been passed expressly to take from him that control, and vest it solely in the members of the general assembly. We cannot conceive of a stronger case for construing a provision of a statute directory than the one here presented. The agreement of time and place for the meeting is the substance of the thing required. The form in which it is made is immaterial. It can neither help nor prejudice any one. To allow an election to be defeated by the failure to use a certain form in making the agreement of the time and place for holding the convention, a mere irregularity in no way prejudicing any one, would be to allow that which is not of the essence of the law to defeat and destroy the substance, the end to be effected.

But the joint resolution was not one which article 2, section 18, of the constitution requires to be presented to the executive, and which cannot become effective without his approval, or adoption notwithstanding his veto. That provision only concerns resolutions or orders, which are legislative in their character, and does not relate to those in regard to mere matters of

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formal procedure, of which the senate and house have exclusive control. There seems to be no conflict of authorities as to this.

The constitution of the United States (article 1, section 7) provides that "every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on the question of adjournment), shall be presented to the president of the United States, and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill," which, while very similar to section 18 of article 2 of the constitution of this State, is broader, in that the requirement covers, not only every resolution and order, but every vote to which the concurrence of the senate and house of representatives are necessary.

This provision has always been construed to include only resolutions which are legislative in their character, and it has never been the practice of the congress of the United States to present to the president for his approval, concurrent resolutions, orders, or votes in regard to matters not legislative.

The question first arose in 1798, when the concurrent resolution submitting the eleventh amendment to the constitution of the United States to the several States for adoption was challenged, because not presented to the president, as supposed to have been required by ar-

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ticle 1, section 7, of the constitution, and it was held that the negative of the president was confined to ordinary cases of legislation, and that he had nothing to do with a resolution of that kind. *Hollingsworth v. Virginia*, 3 Dall., 381, 1 L. Ed., 644.

The subject of joint and concurrent resolutions was considered in a report of the judiciary committee of the senate of the United States, submitted and adopted January 27, 1897, in which it is said:

"We conclude this branch of the subject by deciding the general question submitted to us, to wit, 'whether concurrent resolutions are required to be submitted to the president of the United States,' must depend, not upon their form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do so, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the constitution which declares that every order, resolution, or vote must be presented to the president, to 'which the concurrence of the senate and house of representatives may be necessary,' refers to the necessity occasioned by the requirement of the other provisions of the constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the president. In brief, the nature or substance of the resolution, and

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not its form, controls the question of its disposition.”
4 Hinds’ Precedents of the house of representatives,
secs. 3482-3483.

The constitution of Kentucky (section 89) contains a provision almost identical with that of the federal constitution upon this subject. The legislature of that State enacted an act authorizing the members of the two houses to elect penitentiary commissioners by a joint vote, and, notwithstanding the act did not require the day of election to be fixed by the joint resolution, such a resolution was adopted, and on being presented to the governor for approval, was vetoed. The legislature then proceeded, as in this case, without more, to hold the election, and its validity was attacked in the courts. The case reached the court of appeals of Kentucky, and, as it is particularly applicable to the one under consideration, we quote from the opinion of that court at some length:

It is there said:

“It is claimed that the commissioners could not have been elected except by the respective bodies of the general assembly, in their separate capacity, the senate and house concurring therein; that the joint resolution authorizing a meeting of the joint assembly for the purpose of electing the commissioners should have been approved by the governor before it went into effect; and that the vote cast in the election of the commissioners, also, should have been approved by him. The act authorized the general assembly to elect

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the commissioners on or before the 10th of March, 1898, regardless of the wishes of the governor. It was passed over his objections. By the terms of the act, it could meet at any time on or before that date. By a motion in each house a time could have been designated when the members of the general assembly could meet in joint session to elect the commissioners. The joint resolution simply answered the purpose of such motion. That being the purpose of the joint resolution of the two houses, it certainly was not necessary to obtain the approval of the governor, because the general assembly had, by the passage of the act, been empowered to elect the commissioners. The governor could not invalidate the election by his disapproval of the result. The act gave him no voice in the election. Had the general assembly intended that the election of the commissioners should be subject to the approval of the governor, it would have probably conferred upon him the right to appoint them. We are of the opinion that any action, either by motion, order, or resolution, which the senate and house might have taken with a view of meeting in joint session to elect the commissioners, could be done without presenting it to the governor. The governor's official connection with the matter ceased when the bill became a law. We are of the opinion that section 89 of the constitution was not violated when the general assembly proceeded to the election of the commissioners without the approval of the governor. The bill became a law on the 5th day of March,

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1898, five days before the last day upon which the election should take place. If the views of counsel for appellants are correct, the governor could have prevented an election under the act, and thus destroyed it, by simply holding for six days a resolution fixing the time when the general assembly should meet in joint session to elect the commissioners. He could not prevent the bill from becoming a law by vetoing it, he could defeat its operation by failing to approve the resolution, or the result of the vote. We cannot agree that counsel's view on the question is correct. The commissioners received a majority of the votes of both houses, and of each house, and were duly elected." *Sinking Fund Com'rs v. George*, 104 Ky., 260, 47 S. W., 779, 84 Am. St. Rep., 454.

There are a number of other cases substantially in accord with those from which we have quoted, but we will merely refer to them: *Haight v. Love*, 39 N. J. Law, 14; *Erwin v. Mayor*, 60 N. J. Law, 141, 37 Atl., 732, 64 Am. St. Rep., 584; *State v. City of Duluth*, 53 Minn., 238, 55 N. W., 118, 39 Am. St. Rep., 595; *Rich v. McLaurin*, 83 Miss., 95, 35 South., 337.

A joint resolution fixing the date for the election of officers is not in any sense legislative, but concerns political functions solely within the jurisdiction and control of the legislature, or the members thereof, in regard to which the governor has no authority or duty to perform. There could be no possible reason for giving him notice of an election or obtaining his consent or ap-

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proval of an agreement fixing the date for holding it. He has absolutely nothing to do with the election.

The fact that the resolution was presented to the governor and disapproved did not destroy it.

When it was duly passed, as it was, the law was fully complied with, and what happened afterwards was immaterial, and cannot affect the validity of the resolution, or the election made under it.

Complainants' further contention is that the joint convention had no power or authority to proceed to elect officers, because of the absence of a constitutional quorum of the senate, and is based upon section 11, article 3, of the constitution, providing that "not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business."

Defendants' answer to this objection is that the constitutional provision relied upon applies exclusively to the two houses when convened as the senate and the house of representatives for the purposes of legislation, or doing other business which each, as a separate house, has the power to do, and not when their members meet in joint convention for political purposes.

There is no provision of the constitution, nor statute, expressly providing for joint conventions of the members of the general assembly, or governing their proceedings, except a statute relating to conventions called to elect United States senators, and these are really controlled by an act of congress; but the provisions of

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the constitution providing that the comptroller, secretary of State, and treasurer be elected by a joint vote of both houses of the legislature, and the statute requiring these officers to be elected by the joint ballot of the two houses, by implication, clearly authorize them for election purposes, and it has been the uniform custom to elect these officers, and others created to be elected by the general assembly, in joint convention from the earliest history of the State.

These conventions are deliberative bodies, and, their organization and proceedings not being regulated by any statute, it would seem, like all other such bodies, they would have the power to elect their own officers, and adopt their own rules and be governed by established parliamentary usages and laws, one of which is that a majority of the members constitute a quorum to do business, and a majority of that majority controls and has the power to do the work of the whole. *Lawrence v. Ingersoll*, 88 Tenn., 62, 12 S. W., 422, 6 L. R. A., 308, 17 Am. St. Rep., 870.

They are not a part of the legislative department, and have no legislative powers. Legislation can only be done while the two houses are acting separately in their respective chambers. Their sole power is the political function of electing officers, and then only when that power is expressly delegated to their members. They are merely electoral colleges, composed of the members of the two houses, and have no greater power than if they were composed of judges, or other officers, to whom the power of election had been delegated. It

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is said by a distinguished judge that "the joint convention is a body as different and with as distinct powers and functions from those of the two separate houses as a partnership is from the individuals composing it." *Prouty v. Stover*, 11 Kan., 256.

Joint conventions are not composed of the senate and the house of representatives, but of the members of the general assembly, without regard to the house to which they were elected. The senate, while acting as a separate body, although its members number only one-third of the house, has equal power with the latter, and can reject any measure passed or proposed by it. Thus each senator exercises in all legislation the power of three representatives; but this power is lost in a joint convention. There they meet the members of the house upon an equality, as members of the convention; all having the same authority and only one vote. They are not governed by the rules of the house to which they belong, but by those of the convention.

The only general statutory provision relating to the election of officers by joint conventions is article 1, c. 2, of Shannon's edition of the Code, entitled "Elections by the General Assembly." The first section of this article is as follows:

"Sec. 1136. The following officers are appointed, or elected, by joint ballot of the two houses of the general assembly: The secretary of State, the treasurer, the comptroller, the senators in congress of the United States."

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Following this, in the same article, the manner of electing senators is fixed in these words:

"Sec. 1138. The place of choosing said senators shall be the hall of the house of representatives.

"Sec. 1139. The manner of choosing them shall be by the joint vote of the two houses of the legislature assembled in convention, by a majority of which the choice shall be determined."

The act of congress upon this subject, here inserted for convenience by Mr. Shannon in his edition of the Code, as section 1141, provides that each house, before meeting with the other in convention, shall name one person for senator, and when the two houses are convened, if the same person has received a majority of all the votes in each house, he shall be declared elected senator; "but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this section, the joint assembly then shall proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected being present and voting, shall be declared duly elected."

Whether this language required that a majority of each house, or a majority of both houses—in other words, a majority of the entire membership of the general assembly, regardless of to which house they were elected—be present in order to constitute a lawful convention to elect a senator, it is clear that it does

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not require a constitutional quorum of two-thirds of each house to be present for that purpose.

Could it have been contemplated that a minority of the senate, after a joint convention had been agreed upon by both houses acting separately, with constitutional quorums, should have the power to block the action of the joint convention, and defeat the election of constitutional officers, merely by absenting themselves from the convention? It is difficult to believe that the framers of the constitution intended that such minority should have this power to control, not only the majority of that house, but also the entire membership of the other house in that way.

It is also to be noted that, while the constitution provides that a minority of either house may be authorized by law to compel the attendance of absent members, there is no provision to compel their attendance in joint convention, and it would be in the power of thirteen senators in this State to defeat all elections by the legislature, if a quorum was required.

These considerations strongly support the position of the defendants that the provisions of the constitution prescribing the number of members necessary to constitute a quorum of each house while acting separately have no application to the organization of joint conventions.

The case of *Snow v. Hudson*, 56 Kan., 386, 43 Pac., 260, is relied upon both by the complainants and defendants. This case involved the validity of the election of a State printer by the general assembly, made by

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joint convention in the absence of a quorum of the senate, but by a majority of the two houses. The supreme court of Kansas is presided over by three judges, and they all differed as to the law of the case; but the opinion of the chief justice was based upon statute, and he did not express any views upon the question we are considering. Justices Johnston and Allen, concurring, express their views of joint conventions in these words:

"The term 'joint session,' in our view, has a well-recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body. Each member of that body, when it has been once properly and lawfully convened, has equal rights, and his vote has equal weight with that of any other member; and it is beyond the power of the legislature to say that in a session, which the constitution says shall be joint, the vote of a senator shall have greater weight than a vote of a member of the house. The framers of the constitutional provision, and the people who voted for its adoption, are presumed, not only to have understood the meaning of the words they selected, but also the customs of joint conventions which meet in all the States for the election of United States senators, and in many of them for other purposes. Our understanding of the very purpose of making a session joint is to remove the check which each house holds on the other, and to permit the two houses to vote and act as a single body. If the act of 1879 is valid, twenty-one senators may defeat the election of a State printer, al-

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though one hundred and twenty-five representatives and nineteen senators vote for the same person. No duty would rest on the senators to yield, because their right to vote for the person of their choice would be equal to that of the other members."

Mr. Justice Johnston was of the opinion that a quorum of the senate was not necessary, but that a majority of all the members of the general assembly was sufficient to constitute a valid joint session, and that, notwithstanding the irregular manner in which it was called, the election made should be sustained.

Mr. Justice Allen was of the contrary opinion, and said:

"The writer is of the opinion that, if a quorum of the senators had actually attended, the mere irregularities of getting together would not have invalidated the proceedings, but that the attendance of a quorum of each house is absolutely essential to the power to act as a joint convention. The constitution vests the power to elect in the legislature in joint session. The legislature consists of a senate and a house of representatives. While all of the members need not be in attendance in order to constitute a valid house and a valid senate, a quorum, which the constitution fixed at a majority, must be present, although the house of representatives contains a large majority of the members of the joint convention. Certainly, it seems to me, that there can be no joint convention until the senate attends. The constitution nowhere in express terms or by any fair implication, confers on the house

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of representatives alone, even though every member should vote for the same person, power to elect a State printer. The senate must attend, and the words 'senate' can never mean less than a quorum of the senate."

The case was decided upon another question, and the opinions of the justices are only authority so far as they are sustained by reason and principle.

The separate views expressed by Mr. Justice Allen seem to conflict with those in which he and Mr. Justice Johnston concurred. Can senators and representatives meet and commingle with equal rights as members of a joint convention, an electoral body, and yet be governed by laws applicable to legislative bodies, acting separately, of which they are also members?

While the chief justice was in doubt whether a quorum of both houses was necessary in a joint convention, he approved the case of *Prouty v. Stover*, 11 Kan., 256, which also involved the election of a State printer by the general assembly, in which Mr. Justice Brewer, speaking for the court, said:

"Now there are some sections of our constitution which require for specific acts the concurrence of a certain proportion of the members elected to either house: Article 2, sections 13, 14, 27; article 3, section 15; article 11, section 5; article 14, sections 1 and 2. But these sections all refer to the actions of the two houses meeting in separate session. They prescribe the number of votes in each house which shall be necessary for certain purposes. They nowhere and in no manner refer to the action of the two houses meet-

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ing as one body in joint session. The joint convention is a body as different, and with as distinct powers and functions from those of the two separate houses, as a partnership is from the individuals composing it. Even if it were conceded that these sections cited operated as an implied prohibition on any statutory limitation of the power of a majority of a quorum in the separate houses, still they would not bear upon the powers of a majority of the quorum of a joint convention. A joint convention is a body not recognized by the constitution prior to the amendment of 1868, unless it be the use of the phrase 'the legislature shall by joint ballot,' in section 2 of article 1."

And again he said:

"But, again, the act of voting is not a legislative act. Giving the election of printer to the legislature in joint convention simply creates an electoral college, composed of the members of the two houses. The powers of the college thus created are no greater than if they had been composed of the probate judges of the several counties convened for that purpose. Shall it be said that limitations placed upon the actions of the several houses when performing their appropriate legislative functions, or certain limited judicial duties, apply either directly or by implication to the powers of an electoral college composed of the members of those houses?"

While the opinion of Mr. Justice Allen is the only

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authority cited by complainants to sustain their contention, there are a number holding that, where an election is committed jointly to two separate bodies, a quorum of both is not necessary to make an election valid.

In the case of *Tillman v. Otter*, 93 Ky., 600, 20 S. W., 1036, 29 L. R. A., 110, where the facts are sufficiently stated in the opinion, it is said:

"This court is now asked to declare that election invalid, because a majority of the members of the board of aldermen, with its president in the lead, had refused to discharge their duty, and purposely, as their own exhibits filed show, adjourned, or attempted to adjourn, to a period with a view to preventing an election by the general council, and in utter disregard of both public and private interests. They were, however, still in session, with six of the members ready to act with the other board. They did act, and if the absconding members had remained they could not have prevented the election of the plaintiff, as more than two-thirds of the members of the joint session and of the entire general council voted for him. It is insisted that this body—the general council, acting as the mere agents of the State in election of men to control, as members of the sinking fund, vast sums of money—should be regarded in the light of legislative branches of the government, with the right of a minority to resort to parliamentary rules in order to violate a statute, and prevent an election of those who control a corporation

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entirely distinct from the municipal government which gives to the general council its existence. It is conceded that the councilmen and the board of aldermen are distinct, the one from the other, and that in their legislation for the city the rules governing legislative bodies must ordinarily prevail; but here the general council was made the mere agent of the State to select some one to act for, and control the corporation known as the 'Sinking Fund.' This general council was required to hold an election once in each year, in the month of October, for that purpose, and if they had assembled in that month, and elected by a fair majority vote, a member of the board without any resolution to that effect, this court would have held the election good as against a mere usurper; and in this light the defendant must be regarded, under the facts admitted in this case. It is not denied that on the 25th of October, 1889, the plaintiff received eighteen votes from one body, and six from the other, making twenty-four votes in all; and to hold that the plaintiff was not elected under the circumstances, because of the violation of official duty by the majority of the board of aldermen, would be recognizing a rule that no court should be willing to adopt."

The case of *Whiteside v. People*, 26 Wend. (N. Y.), 634, involved the election of a county treasurer by the board of supervisors and the judges of the courts of common pleas, in which the latter refused to participate.

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The headnote of this case is as follows:

"So where the appointment to office is given to two distinct bodies, and the mode of appointment is directed to be after this manner, each body to meet in its own chamber and make a nomination, both bodies then to assemble in joint meeting and compare nominations, if the nominations agree, the person nominated to be considered as appointed, but if there be no concurrence then the two bodies to proceed to elect by joint ballot from the persons nominated, and an invitation to be given by one body to the other to assemble in joint meeting for the purpose of making a particular appointment, and the two bodies assemble in joint meeting, not for the purpose of making the proposed appointment, but for the transaction of other business, and when thus assembled it is agreed by a majority of voices to proceed to the contemplated appointment, and an announcement of a nomination by one of the bodies be made, and it will be declared, that the other has made no nomination and refuses to act in the matter, the appointment of the officer by a majority of the whole number of both bodies is a valid appointment, although all the members of the body which had omitted to make a nomination leave the joint meeting and take no part in the appointment. The decision in 23 Wendell, 9, is accordingly overruled."

The direct question was presented to the senate of the United States in the election contest of *Davidson v. Call*, from Florida.

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Call had received the votes of a majority of the members of the joint convention, but at the time of the election a constitutional quorum of the senate was absent. The governor, being of the opinion that there was no election, appointed Davidson senator. The credentials of the two were referred to the committee on privileges and elections. This committee found the facts as here stated, and reported as follows:

"This act [of July 25, 1866] provides that 'the members of the two houses shall convene in joint assembly,' etc. The joint assembly is thus composed, not of the two houses as such; it is not a merger of the two houses into one of either; but it is a body distinct and separate from either as such, and has by the words of the enactment a quorum of its own prescribed and defined, to wit, 'a majority of all the members elected to both houses,' without any reference to a quorum either of the senate or of the house. . . . The term 'legislature' in this clause is not to be construed technically with reference to the separate chambers which may exist within it, but as designated the collective number of all the persons composing it, and that therefore Mr. Call was duly elected."

"February 4, 1892, the senate considered this report and declared Mr. Call lawfully entitled to a seat in the senate." 2 Hinds' Prec. of the House of Rep., sec. 1060. See, also, *Beck v. Hanscom*, 29 N. H., 213; and *Kimball v. Marshall*, 44 N. H., 465.

The weight of authority seems to be against complainants' contention, but the question must be deter-

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mined upon the constitution and laws of this State, regardless of how it may have been settled in other jurisdictions.

The decision of this question, however, is not necessary or determinative of the case, if the appointment of the defendants made by the comptroller, treasurer, and secretary of State after the adjournment of the legislature was valid; for, if complainants' successors have been lawfully elected or appointed, their terms have expired and they have no standing in court. Therefore, conceding, but not deciding, that the election was void for the want of a constitutional quorum of the senate in the convention, and that three vacancies existed in the board during recess, we will determine whether or not they were lawfully filled.

Complainants attack the appointment of the defendants as members of the State board of elections by the comptroller, secretary of State, and treasurer, under section 3 of the amendatory act, upon the ground that the vacancies occurred while the legislature was in session, and that those officers were only authorized to fill vacancies happening during recess of that body.

The part of section 3 of the act, under which the appointment was made, is in these words:

"All vacancies shall be filled as in the first instance, by joint vote of the general assembly, except vacancies occurring when the general assembly is not in session, when if the office of only one member is vacant, an appointment to fill such vacancy shall be made by the

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remaining members of the board within thirty days after the vacancy occurs; and provided, further, that in the event the remaining commissioners fail to fill the appointment within the time mentioned, the same shall be filled by the secretary of State, comptroller, and treasurer, or a majority, from the same party in which the vacancy occurred, to hold until the convening of the general assembly; but should there be more than one vacancy on such board, the same shall be filled by appointment of the secretary of State, comptroller, and treasurer, or a majority of those officers."

Complainants construe this to confine the authority of the appointing power to vacancies which take place during recess of the general assembly, while the defendants construe it to mean vacancies that may exist during recess without regard to when the office became vacant.

The office of members of the State board of elections was vacant if the previous election was not valid. When an office is created it is vacant until it is filled. *Condon v. Maloney*, 108 Tenn., 82, 65 S. W., 871; *State v. Akin*, 112 Tenn., 603, 79 S. W., 805; *State v. Glenn*, 7 Heisk., 472.

There is no technical or peculiar meaning to the word "vacant" when applied to office. It means unoccupied, without an incumbent, regardless of whether it was ever filled, or when or how it subsequently became without an incumbent. *Clarke v. Irwin*, 5 Nev., 129.

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The words "occur" and "happen" are usually used in referring to vacancies in office, and mean the same thing.

In *Fritts v. Kuhl*, 51 N. J. Law, 192, 17 Atl., 102, it is said:

"The word 'happen,' in its strictest literal sense, signifies an unexpected event. It is also not uncommonly used as synonymous with 'occur,' 'take place,' 'exist,' and 'happen to be.'"

Mr. Webster defines the verb "to occur": "To be found or met with"—and the Century Dictionary: "Be found; be met with," and a quotation is given showing that it is synonymous with the word "exist."

In Roget's Thesaurus, in treating of the state of "being," the word "occur" is used as equivalent of "exist."

We think that "occur" or "occurring" means the same as "happen" or "happening," or that both may be used in the sense of "existing" or "to be found," and that this definition has been given them in construing clauses of constitutions and statutes concerning the filling of vacancies.

Complainants do not cite any adjudged cases upon this question, but for authority rely upon the construction given article 1, section 3, of the constitution of the United States, providing for vacancies in the office of senator in these words:

"If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments

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until the next meeting of the legislature, which shall then fill such vacancies."

They say:

"The federal constitution provides that, if vacancies 'happen' in the office of senator during a recess of the legislature, the governor may appoint. Article 1, sec. 3. In the cases before the senate there was controversy as to the meaning of the word 'happen.' One view was that it means vacancies caused by fortuitous or uncertain things, and not a vacancy which it is known must happen, as by reason of the expiration of the term on the 3d day of March. But this view was rejected, and it was held that it means a vacancy from any cause. Senator Turley, of Tennessee, submitted the report in Senator Quay's case (and it was adopted), which said:

" '[A vacancy] having "taken place," "occurred" "came to pass," it may continue indefinitely; but it does not continually and momentarily "take place," "occur," nor "come to pass," again and again. Hence a vacancy must begin or commence during a recess of the legislature before the executive can appoint. *Senate Election Cases*, S. 2, ss, 107, 110.' "

We do not think that the words "occur" and "occurring" in this statute should be so construed, but that the intention of the legislature was to provide for vacancies that might exist at any time, regardless of when the office became vacant.

The authority vested in the comptroller, secretary of state, and treasurer was in the interest of the public, and necessary for the effective administration of the

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law, and should be given a liberal construction in order to carry out the intention of the lawmakers. This is the view taken of the clause in the constitution of the United States (article 2, section 2), authorizing the president to fill "all vacancies that may happen during the recess of the senate by granting commissions, which shall expire at the end of their next session."

The question early arose whether or not under this clause the president was authorized to appoint to an office which became vacant while the senate was in session and remained vacant until after adjournment of that body.

The president was advised that the word "happen" was synonymous with the word "exist," and that he did have the power to appoint when a vacancy existed without relation to when the office became vacant.

We find this statement in *Fritts v. Kuhl*, 51 N. J. Law, 194, 195, 196, 17 Atl., 103, of how the question arose, and was disposed of under different administrations:

"During the administration of President Monroe, in 1823, the question arose whether he had the power to fill, during the recess of the senate, a vacancy which had begun during the preceding session of the senate. During that session the president had made a nomination which the senate refused to confirm, and then adjourned, leaving the office unfilled.

"Mr. Wirt, then attorney-general, advised the president that he had power to fill the vacancy. In his

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opinion he says: 'Had this vacancy first occurred during the recess of the senate, no doubt would have arisen as to the president's power to fill it. The doubt arises from the circumstance of its having first occurred during the session of the senate. But the expression used by the constitution is "happen." "All vacancies that may happen during the recess of the senate." The most natural sense of this term is "to chance, to fall out, to take place by accident." But the expression seems not perfectly clear. It may mean "happen to take place"—that is, "to originate"—under which sense the president would not have the power to fill the vacancy. It may also, without violence to the sense, mean "happen to exist," under which sense the president would have the right to fill it by his temporary commission. Which of these two senses is to be preferred?

"The first seems to be most accordant with the letter of the constitution; the second most accordant with its reason and spirit. The meaning of the constitution seems to me to result in this: That the president alone cannot make a permanent appointment to those offices; that to render the appointment permanent it must receive the consent of the senate; but that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which the advice and consent of the senate cannot be immediately asked, because of the recess, the president shall have the power of filling it by an appointment to continue only until the senate shall have passed upon it, or, in the language of the constitution, till the end of the next

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session. . . . In reason it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the president is called on to act.'

"In 1825 Mr. President Adams adopted this construction of the constitution in the appointment of Amos Binney as navy agent of the port of Boston.

"During the administration of President Jackson, in 1832, Attorney-General Taney gave an opinion in which he accepted the interpretation of his predecessor, and held that the meaning of this clause of the constitution is 'if there happen to be any vacancy during the recess.' To enforce his views, he states instances in which it cannot be imagined that the power to fill the vacancy was intended to be withheld from the president.

"An officer may die abroad or in a distant part of the country, and his death not be known until after adjournment, or a nomination may be confirmed by the senate, and the appointee may refuse to accept after adjournment.

"In 1841 Mr. Legare, attorney-general, expressed a like opinion (Vol. 3, p. 673), which was concurred in by Mr. Attorney-General Mason in 1846. Vol. 4 of Opinions, p. 523.

"In 1855 Attorney-General Cushing, referring to the opinions of his predecessors in office, says:

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“They have thoroughly demonstrated and conclusively established, as a doctrine of administrative law, that the expression of the constitution, “all vacancies that may happen,” signifies “all vacancies that may happen to exist in the recess,” or “when there happen to be any vacancies in the recess.” And they concur in the general statement that, howsoever a vacancy happens to exist, if it exists it may be filled by temporary appointment of the president. They all agree that it is the true spirit of the constitution to have the offices, which congress indicates to be needful by creating them, filled, though provisionally, rather than remain vacant or force a special call of the senate.’ Vol. 7 of Opinions, p. 187.

“To the same effect are the opinions of Attorney-General Bates, in 1862, and Attorney-General Speed, in 1865.

“Mr. Attorney-General Stanberry, in 1866, gave a very elaborate opinion, the conclusion of which was that the president has full and independent power to fill vacancies in the recess of the senate, without any limitation as to the time when they first occurred. Vol. 12 of Opinions, p. 32.

“Mr. Evarts, when attorney-general, in 1868, in a carefully prepared opinion, reached the conclusion that a vacancy occurring while the senate was in session, and continuing, through the failure of the senate to confirm a successor, could be filled by the president during the recess of the senate. Vol. 12 of Opinions, p. 449.

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"In 1868 Judge Cadwallader, of the United States district court of Pennsylvania, dissented from these views. *Dist. Atty. Case*, 7 Am. Law Reg. [N. S.], 786.

"Ten years later Justice Woods, of the United States supreme court, sitting in the Georgia circuit, refused to concur in the opinion of Judge Cadwallader. *Farrow's Case*, 3 Fed., 112.

"And Attorney-General Devens, in 1880, after an elaborate discussion of the subject, concluded that the opinions of his predecessors, and the practice under them, had settled the construction of the constitution that appointments might rightly be made, though the vacancy first began during the session of the senate, and he declared that the contrary view of Judge Cadwallader could not be considered of great authority or weight against these opinions, and an administrative usage which commenced as early as the time of President Monroe, and in reference to which such usage has been invariable. Vol. 16 of Opinions, p. 522."

The case from which this is taken is also in point. The governor of New Jersey nominated Richard S. Kuhl to the office of judge of the Hunterdon pleas to fill a vacancy that occurred during the session of the senate. The senate refused to consent to the appointment and rejected it. No other nomination or appointment was made until after the adjournment of the legislature, when the governor again appointed Mr. Kuhl, and his authority to make this appointment was challenged upon the ground that the provision in the constitution of New Jersey that "when a vacancy happens

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during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session," only authorized him to fill vacancies taking place from some cause during recess of the legislature.

In the opinion of the court it is said:

"If, therefore, within the meaning of this paragraph of the State constitution, 'this vacancy happened during the recess of the legislature,' it was the duty of the governor to fill it. The word 'happen,' in its strictest literal sense, signifies an unexpected event. It is also not uncommonly used as synonymous with 'occur,' 'take place,' 'exist,' and 'happen to be.' In its most rigorous meaning, if the contingency implied by it is referred strictly to the time of the occurrence of the vacancy, it will exclude the power of the governor to appoint where an official term expires by its own limitation in the recess; for in that there is nothing uncertain, the time is fixed and definite. On the contrary, it may be said that, while there is no uncertainty as to the point of time when the vacancy will occur in such case, there is uncertainty whether the senate will be in session, and therefore a word implying an unexpected event is properly used. It may also be argued that, if the uncertainty implied by the word 'happens' is as to the senate being in session, the vacancy does not happen then, the time of that is certain, but the senate happens not to be in session, and that the

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constitutional clause should be read as follows: 'When it happens that the senate is not in session when there is a vacancy.' This would give the governor power to appoint in all cases of vacancy. These suggestions are made to show that the import of this clause is not free from doubt.

"In order, therefore, to ascertain its true meaning, in accordance with the recognized rules of interpretation, we must seek for the reason and spirit of it, having regard to the effects and consequences of the construction adopted, and the source from which the language employed was derived. Was it intended merely to prevent those offices from remaining vacant, which became so during the recess of the legislature by some casualty, or was it to prevent any of the enumerated offices from remaining vacant during the recess of the senate, without regard to when or how the vacancy occurred?"

And then, after stating the construction placed upon the constitution of the United States, authorizing the president to fill vacancies, as above quoted, the court held that the constitutional provision intended to provide for vacancies whenever found existing, and that the appointment made by the governor was valid.

The question arose in New Hampshire, and under the practice in that State the governor requested the opinion of the justices of the supreme judicial court upon the subject.

The legislature of New Hampshire had enacted a statute creating the office of auditor of accounts, to be

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filled by the legislature, and provided in the act "that if a vacancy shall happen during the recess of the legislature," a successor may be appointed by the governor with the advice and consent of the council, and shall hold his office until a successor be chosen by the legislature and qualified." The legislature, after repeated balloting, were unable to unite upon the same candidate, and adjourned, leaving the office unfilled, as in this case, if the election of defendants is void.

The justices, after stating the case, concluded:

"Every consideration of convenience and of public policy would urge such a construction of the act, if it can properly be given, as to allow of the appointment of the auditor by the governor and council at this time. Now, can there be any doubt as to the intention of the legislature that the act should go into immediate effect?

"At the time of its passage they did not, of course, anticipate that the two branches of the legislature would, after repeated ballotings and the report of a committee of conference, be unable to unite upon the same candidate, and hence, as the act requires an election concurrence, that no election would be made, which is the reason why they spoke of a successor being appointed in case of vacancy, instead of speaking of an incumbent or an auditor. But they evidently intended to make provisions for every case that they supposed could possibly arise.

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“And the question is whether the language they had used is fairly capable of such a construction as will cover the vacancy in question. For, where the intention of the legislature is plain, as in this case, it is the duty of the court so to construe the act as to carry out those intentions, when the language used will fairly admit of such construction. *Fairbanks v. Antrim*, 2 N. H., 105. And when the meaning of the words used is doubtful, or they are susceptible of a double construction, that sense is to be adopted which best harmonizes with the context and the apparent policy and object of the legislature. *Pike v. Jenkins*, 12 N. H., 255.

“Here the provision is, ‘In the case of any vacancy in said office by death, resignation, or otherwise, a successor shall be appointed,’ etc. There is now a vacancy in said office unquestionably, because the office has been created, and the law creating it is in force, and the office is not filled, but is vacant. The term ‘vacancy’ means an empty space, a place unfilled, and when applied to an office it means the state of being destitute of an incumbent, or a want of the proper officer to officiate in such office. But in neither case has it any reference whatever to any former time, or to any former condition of the place or office. If a place is empty now, there is a vacancy, and it matters not whether it has once been filled, or whether it has always been empty. And so of an office. So far, then, all is plain.

“But the subsequent proviso is that, ‘If such vacancy shall happen during the recess of the legislature such

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successor may be appointed,' etc., 'and shall hold his office,' etc. Now, the word 'happen' may have many significations or meanings, depending much upon its connection with other words and the circumstances under which it is used. Where the expression is 'if such vacancy shall happen,' etc., the word 'such' referring to the vacancy just mentioned, which might exist in consequence of death, resignation, or otherwise; that is, in any way or from any cause whatever. 'If any such vacancy shall happen;' that is, shall occur, shall chance to exist, shall happen to be, during the recess of the legislature, etc. The substance of both these sentences might be expressed in this way without doing any violence to the language: 'If there shall happen to be, during the recess of the legislature, any vacancy in said office, which may exist in consequence of death, resignation, or in any way, or for any other cause,' such successor may be appointed by the governor, etc. Believing that such a construction may be fairly given to the language of the act, and that by giving it that construction we should be only giving effect to the clear intent and will of the legislature, our opinion is that the governor and council have a legal right to appoint an auditor under the act in question."

In Re Farrow (C. C.), 3 Fed., 112, following the opinions of the attorney-general, it was held that the provision of the constitution we have referred to meant "vacancies that may happen to exist during the recess of the senate," and an appointment by the president

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of a district attorney to fill an office which became vacant while the senate was in session was held valid.

Other cases, which are to some extent in accord with these, are: *Miller v. Washington*, 2 Hayw. & H., 244, Fed. Cas., No. 9593a; *Walsh v. Com.*, 89 Pa., 419, 33 Am. Rep., 771; *State v. Ware*, 13 Or., 380, 10 Pac., 885; *In re Representation Vacancy*, 15 R. I., 621, 9 Atl., 222; *Elliott v. Burke*, 113 Ky., 479, 68 S. W., 445.

The legislature evidently intended by the language used in section 3 to provide for vacancies that might, under any circumstances, exist in these important offices. And as this intention is fairly expressed, and when taken in connection with the well-settled construction of the constitution of the United States in regard to the appointing power of the president, with which the lawmakers are presumed to have been familiar, definitely expressed, it should be given effect. If the question were one of doubt, public policy and the effective administration of the law would require the doubt to be resolved in favor of the power to appoint.

Suppose the amendatory act was an original statute, and that for some reason the legislature had failed to make an election; would it be contended there was no authority under this statute to fill an office, two vacancies in which would prevent all elections in the State from being held? And would the act be so construed? We think not. The disastrous consequences which would follow a long-continued vacancy in these offices is obvious, and need not be elaborated.

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The failure of the legislature to fill the offices was a contingency that its members knew might arise, and it is to be presumed that they did not intend that they should remain vacant at any time for want of an appointing power.

We are of the opinion that the act does provide for filling all vacancies that may be found to exist in the members of the State board of elections at any time; and that, when there exist two or more during recess of the legislature, the comptroller, secretary of State, and treasurer are authorized to fill them, without regard to when the vacancies occurred, and that the appointment of the defendants, conceding the election to have been void, which we do not decide, was valid, and vested them with the title and all the powers of the offices in question.

There is another question, which properly should have been the first disposed of; but we have followed the order of the assignments of error. This objection is in regard to the passage of the act, and is based upon an entry in the house journal. This amendatory act was Senate Bill No. 270. After having been passed on the third reading in the senate, it was sent to the house and there passed first reading. It was then substituted for House Bill No. 340, a similar bill, and passed third reading. It appears from the journal that a motion was made to postpone action on House Bills 340, 341, and 349, and that this motion was tabled. The entry then relied upon recites that another

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member "moved that House Bills 340 and 341 be passed upon second reading and referred to committee on elections," and another entry shows that this motion prevailed by a constitutional majority.

It is argued that the entry quoted shows that the amendatory act was not lawfully passed upon a second reading in the house, and in compliance with article 2, section 18, of the constitution, requiring every bill to be read and passed upon three different days in each house before it shall become a law.

The precise contention seems to be, not that the house bill did not pass a second reading by a constitutional majority, but that the entry quoted shows that it was passed concurrently with another bill, No. 341, upon a different subject.

The constitutional provision relied on (section 18, art. 2) does not require each bill to be passed separately, and, while we think that concurrent action upon the two bills would be contrary to good parliamentary procedure, and should not be done upon objection made, we cannot see that this alone would authorize the courts to hold the reading nugatory. But we do not consider the journal entry relied upon as conclusive evidence that the two bills were voted upon at the same time. As is stated in *Nelson v. Haywood County*, 91 Tenn., 605, 20 S. W., 3:

"In the nature of things, legislative journals are frequently 'constructed from loose memoranda, made in the pressure of business, and amid the distractions of a numerous assembly.'"

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And they cannot always be relied upon to defeat a statute which otherwise appears to have been constitutionally enacted.

It is well settled by repeated decisions of this court that, where an act has been signed by the speakers of each house and approved by the governor, or otherwise passed, as in the case of this act, and published in the printed acts of that session of the general assembly, every presumption is made in favor of the regularity of its enactment and validity. In *Nelson v. Haywood County*, supra, it is further said:

“The construction placed on the constitutional provisions in relation to the steps to be taken by the legislature in enacting bills, under the decisions of this court, is to the effect that, while the journals will be considered in determining the validity of an act of the legislature, every reasonable inference and presumption will be drawn and indulged in favor of the regularity of its passage, and where it did not affirmatively appear not to have passed, and such legitimate construction could be given to the record as sustained by law, it would be done.”

In *State v. Swiggart*, 118 Tenn., 562, 102 S. W., 77, it is said:

“The general assembly is a co-ordinate branch of the government, and every reasonable presumption is made in favor of the regularity and validity of its proceedings.”

In *State v. McConnell*, 71 Tenn., 341, it is said:

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"The bill conceded that the act under consideration was signed by the speakers of both houses of the legislature and by the governor. . . . Under these circumstances, the presumption in favor of the regularity of the passage of the act through all its stages is so strong that the mere failure of the journals of the senate to show a second reading, if the fact be that way, would not affect its validity, but would be treated as a clerical omission."

In *Williams v. State*, 74 Tenn., 553, where it appeared that the journal of the house failed to affirmatively show that the bill received a constitutional majority on its third reading, it is said:

"The rule is that the journals may be looked to in order to determine whether the bill was in fact passed, but every reasonable presumption must be made in favor of the action of a legislative body acting in the apparent performance of its legal functions. The courts will not presume, from the mere silence of the journals, that the house had disregarded the constitutional requirements, unless where the constitution expressly requires the fact to appear on the journals."

In the case of *State v. Algood*, 87 Tenn., 167, 10 S. W., 312, where the journal of the senate showed that the bill had failed of passage, and a motion to reconsider was made, but no disposition made of the motion appeared, in sustaining the act, Judge Lurton, speaking for the court, said:

"We see from the journal that subsequently the speaker of the senate, in open session, announced that

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he had signed this bill; and this solemn official act is noted upon the journal, as required by the constitution. What presumption arises from this evidence of the passage of the bill? We think the rule well settled that, where the journal does not affirmatively show the defeat of the bill, every reasonable presumption and influence will be indulged in favor of the regularity of the passage of an act subsequently signed in open session by the speaker."

We think that under these authorities it must be held that the journal entry, reciting that the two bills were acted upon at one time, was an inaccurate statement of the clerk, or a clerical error, or that at a subsequent time the bill was lawfully passed upon its second reading. It is not a case where it affirmatively appears from the journal that the constitutional requirement was not complied with. As stated, the bill appears to have been signed by the speakers of both houses, vetoed by the governor upon other objections than the one here made, and afterwards passed over his veto, and we do not think the journal entry relied upon is sufficient to overcome this evidence of its lawful enactment.

The result is that there is no error in the decree of the chancellor dismissing complainants' bill, and it is in all things affirmed.

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W. L. LEDGERWOOD *et al.* v. JOHN A. PITTS *et al.*¹

(*Nashville.* December Term, 1909.)

1. **PRIMARY ELECTIONS.** Not "elections" in the sense of the suffrage and election provisions of the constitution, and laws therefor may be enacted.

The compulsory primary election law (Acts 1909, ch. 102), establishing legalized compulsory primary elections for political nominations, did not provide for "elections" within the meaning of the suffrage and election provisions of the constitution, and it was in the competency of the legislature to pass such an act, if not violative of other constitutional provisions. The primary election is simply a substitution for the caucus or convention, and in reality is not an election, but merely a nominating device. (*Post*, pp. 588-601.)

Acts cited and construed: Acts 1909, ch. 102.

Constitution cited and construed: Art. 1, sec. 5; art. 4, sec. 1.

Cases cited and approved: *Hanna v. Young*, 84 Md., 179; *Kennegew v. Allegany Co.*, 102 Md., 122; *Montgomery v. Chelf*, 118 Ky., 766; *State, ex rel., v. Swanger*, 212 Mo., 472; *State, ex rel., v. Jensen*, 86 Minn., 19; *People v. Committee*, 164 N. Y., 335; *State v. Felton*, 77 Ohio St., 554; *State v. Michel*, 121 La., 374.

Cases cited and disapproved: *Johnson v. Grand Forks Co.*, 16 N. D., 363; *Spier v. Baker*, 120 Cal., 370; *State, ex rel., v. Canvassers*, 78 S. C., 461; *People v. Commissioners*, 221 Ill., 9.

2. **SAME. Same.** Statutes may be enacted requiring nominations by primary, and prescribing additional qualifications for participants.

The legislature may require that nominations for elections shall be by primary, and may prescribe additional qualifications for the voters participating in the same. (*Post*, pp. 594, 595.)

¹ As to "Primary Elections" as elections, within constitution or statute relating to elections generally, see note to *Line v. Waite*, (Mich.), 18 L. R. A. (N. S.), 412.

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Cases cited and approved: Runge v. Anderson, 100 Wis., 533; State, ex rel., v. Moore, 87 Minn., 308; State v. Drexel, 74 Neb., 776; Hopper v. Stack, 69 N. J. Law, 562; Coffee v. Committee, 164 N. Y., 335; Healey v. Wipf (S. D.), 117 N. W., 521; Griffin v. Gesner, 78 Kan., 669; Walling v. Lansdon, 15 Idaho, 282; State v. Nichols, 50 Wash., 508.

3. SAME. Statute excluding political parties casting less than ten per cent of the entire vote is not unconstitutional for that reason.

The compulsory primary election law (Acts 1909, ch. 102) is not unconstitutional, and is not violative of the constitutional inhibitions against special and partial laws, because its classifications are not unreasonable, arbitrary, or capricious, in that the first section of the act excludes from its benefits political parties casting less than ten per cent of the entire vote of the State at the preceding general November election. Such classification and exclusion is not unreasonable, arbitrary, capricious, and partial. Such minor political parties are not prohibited from making nominations in any manner deemed most expedient, and the names of their candidates may be printed on the official ballots voted in the general election. (*Post*, pp. 601-604.)

Acts cited and construed: Acts 1909, ch. 102, sec. 1.

Cases cited and approved: Kenneweg v. Allegany Co., 102 Md., 128; State v. Poston, 58 Ohio St., 620; Gentsch v. State, 71 Ohio St., 151; State v. Felton, 77 Ohio St., 572; DeWalt v. Bartley, 146 Pa., 529; State v. Black, 54 N. J. Law, 446; State v. Anderson, 100 Wis., 523; Miner v. Olin, 159 Mass., 487; Corcoran v. Bennett, 20 R. I., 6; Ladd v. Holmes, 40 Or., 167.

Cases cited and disapproved: Spier v. Baker, 120 Cal., 370; Button v. Board, 129 Cal., 337.

4. CONSTITUTIONAL LAW. Statute for compulsory primary elections for political nominations is not unconstitutional because it excludes the judiciary.

The compulsory primary election law (Acts 1909, ch. 102), establishing compulsory primary elections for political nominations,

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is not unconstitutional because it excludes from its operation the judiciary, including the district attorneys as a part of the judiciary; for such classification is natural, reasonable, and valid, and is not arbitrary, capricious, or unreasonable. (*Post*, pp. 605-608.)

Acts cited and construed: Acts 1909, ch. 102, sec. 1.

Constitution cited and construed: Art. 1, sec. 8; art. 11, sec. 8.

Cases cited and approved: *Stratton v. Morris*, 5 *Pickle*, 497.

5. **SAME.** Same. Statute for compulsory primary elections excluding all the judicial officers except the county judges, is unconstitutional for its arbitrary classification.

The compulsory primary election law (Acts 1909, ch. 102), establishing compulsory primary elections for political nominations, and excluding from its operation the judiciary, except county judges, is unconstitutional, because the inclusion of the county judges and the exclusion of the other judicial officers constitutes an unreasonable, capricious, and arbitrary classification. (*Post*, pp. 605-608.)

Acts cited and construed: Acts 1909, ch. 102, sec. 1.

Constitution cited and construed: Art. 1, sec. 8, art. 11, sec. 8.

Cases cited and approved: *State, ex rel., v. Glenn*, 7 *Heisk.*, 472; *State v. McKee*, 8 *Lea*, 24; *State v. Leonard*, 86 *Tenn.*, 485; *Stratton v. Morris*, 89 *Tenn.*, 497; *State v. Maloney*, 92 *Tenn.*, 68; *Johnson v. Brice*, 112 *Tenn.*, 59.

6. **SAME.** Act whose body provides for State conventions to select party presidential electors and delegates to national conventions, under its title providing for compulsory primary elections, is unconstitutional, because its body is broader than its title.

The compulsory primary election law (Acts 1909, ch. 102), entitled "An act to establish a compulsory system of legalized primary law for political nominations, to create the agencies for its operation, and penalize its violation," provides in its body an elaborate plan for the nomination of party candidates by compulsory primary elections, and also provides the agencies and

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instrumentalities for effectuating the system therein devised, all of which is proper and germane to the main object expressed in the title; but in section 9, the act provides for the holding of State conventions to select party presidential electors and delegates to national conventions, and to formulate platforms, and this provision for State conventions for the selection of such electors and delegates is not germane to the subject expressed in the title, and makes the body of the act broader than its title, and thus renders the act unconstitutional. (*Post*, pp. 608, 609.)

Acts cited and construed: Acts 1909, ch. 102, sec. 9.

Constitution cited and construed: Art. 2, sec. 17.

Case cited and approved: Dixon v. State, 117 Tenn., 81.

7. SAME. Compulsory primary election law requiring the payment of fees as a condition of becoming a candidate, is unconstitutional, because arbitrary, oppressive, and unreasonable. The compulsory primary election law (Acts 1909, ch. 102) is unconstitutional in the provision (sec. 42) imposing upon candidates the payment of specific fees, varying with the offices, for the expenses of holding the primary election, the payment of which is required as a condition of becoming a candidate, because such provision makes an arbitrary, capricious, and unreasonable classification of candidates in providing that persons who are able to pay the prescribed fees may enter the primary, while other men who are equally capable and worthy are excluded because of their pecuniary inability to pay the prescribed fees. Such a law is unreasonable because the classification is arbitrary and oppressive. (*Post*, pp. 609-612.)

Acts cited and construed: Acts 1909, ch. 102, sec. 42.

Cases cited and approved: People v. Williams, 145 Ill., 573; People, ex rel., v. Breckon, 221 Ill., 9; Johnson v. Grand Forks Co., 16 N. D., 363.

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8. SAME. Whole act is unconstitutional where its unconstitutional parts cannot be elided or excised.

The constitutional infirmities in the compulsory primary election law (Acts 1909, ch. 102), pointed out in the last three headnotes (5, 6, and 7), go to its integrity, and no process of elision or excision can be applied which will rescue and preserve the remainder of the act, and so the whole act is unconstitutional and void. (*Post*, p. 612.)

Acts cited and construed: Acts 1909, ch. 102.

9. SAME. State legislature has all power, except as limited by the State and federal constitutions; while congress has no power except that conferred by the federal constitution.

It is fundamental and axiomatic that a State legislature is the reservoir of all of the reserved power of the people, except as it may be limited and circumscribed by the State and federal constitutions; and the lawmaking power of the State recognizes no restraints and is bound by none except such as are imposed by said constitutions. The reverse is true of the federal congress, which can only exercise such power as is expressly or impliedly conferred by the constitution of the United States. (*Post*, pp. 588-590.)

10. SAME. Election and suffrage clauses of the constitution do not apply to municipal elections.

Municipal elections are not within the meaning of the election and suffrage clauses of the constitution, which apply to elections referred to in that instrument and to such offices as may be created by the legislature. It has never been supposed that these clauses applied to municipal corporations, since it has been the practice of the legislature to permit owners of real estate situated within the corporate limits to vote in municipal elections, independent of their place of residence or other qualifications. (*Post*, pp. 597-600.)

Code cited and construed: Sec. 1952 (S.); sec. 1634 (M. & V.); secs. 1352, 1369 (T. & S. and 1858).

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Acts cited and construed: Acts 1875, ch. 92, sec. 10; Acts 1881, ch. 127; Acts 1883, ch. 114, sec. 11; Acts 1885, ch. 82, sec. 6.

Constitution cited and construed: Art. 1, sec. 5; art. 4, sec. 1.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

JAMES C. BRADFORD, VERTREES & VERTREES, and D. B. PURYEAR, for complainants.

CHARLES T. CATES, JR., PITTS & McCONNICO, and TILLMAN & McCALL, for defendants.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The fundamental question presented on this record is in respect of the constitutionality of chapter 102 of the Acts of 1909, popularly known as the "Primary Election Law." The bill was exhibited by complainants, as citizens and taxpayers of the State, against the members of the State Democratic and Republican

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boards of primary election commissioners, for the purpose of enjoining defendant commissioners from exercising their functions and having their salaries and expenses incurred by them in the execution of the act paid out of the funds of the State, on the ground that the act creating said boards is unconstitutional and void; and in the alternative, assuming said act to be valid, it is charged that commissioners were illegally elected or appointed. The complainants prayed for writs of injunction restraining the defendants from executing, or attempting to execute, said act, and for a decree declaring said act void and the election of defendants unlawful. The defendant commissioners demurred to the bill, assigning fifteen specifications, all of which were overruled by the chancellor, the act adjudged unconstitutional, and an injunction granted restraining the commissioners from incurring any expense in the exercise of the powers or in the performance of the duties conferred upon them by said act. The defendants appealed, and have assigned the action of the chancellor for error.

The act in question is entitled "An act to establish a compulsory system of legalized primary law for political nominations, to create the agencies for its operation and penalize its violation." It is conceded that the act in its particular operation applies only to two of the political parties in the State—the Democratic and Republican—though by its terms it embraces all political parties which cast more than 10 per cent

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of the entire vote of the State at the general November election next preceding the primary therein directed to be held.

"Section 1. That excepting the offices of judges of the supreme court of the State and judges of the court of civil appeals, chancellors, criminal and circuit judges and attorneys-general, all party nominations of candidates hereafter in this State made for offices—county, State, and congressional—elective by the electors of the State, or for offices created by the constitution of the State, elective by the general assembly in joint session, shall be made in and by a primary election held for each political party, in the manner, at the times, and under the requirements prescribed by this act; and unless this act is complied with party nominations falling within the terms of the same shall not be placed upon the official ballots provided for by the laws of the State for general elections; provided, however, that this act shall not apply to non-partisan candidates or to persons desiring to become candidates independent of party nominations; nor to persons of any other party affiliation which did not, at the general November election next preceding the primary, cast more than ten (10) per cent of the entire vote in the State; and, provided, also, that this act, as to nominations for county officers other than legislative members, county executive committeemen, and delegates to State conventions, to be chosen as hereafter directed, shall not apply, when a county executive committee of the party

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it represents not less than forty days prior to the first Monday of April designated by this act, as the date of the first and recurring biennial primary elections, shall have provided for nominations for such county officers by some other legal method than that prescribed by this act; but this proviso shall not relieve the county executive committees from the performance of such duties as may be otherwise prescribed by this act.

"Sec. 2. That the representative civil district and ward committeemen of the political parties of the State falling within this act, who shall compose, as hereinafter prescribed, the county executive committee of a party and delegates of political parties to the State convention, hereinafter provided for, shall be elected in and by the said primary elections.

"Sec. 3. That commencing on the first Saturday in April, 1910, and biennially thereafter on said day, there shall be held a primary election for nominations for party candidates, ward and civil district committeemen of the county, and delegates to the State convention herein provided for; but in case a second primary should become necessary under the subsequent provisions of this act, the same shall be held on the fourth Saturday following the date of the original or first primary heretobefore directed."

Section 4 provides that party nominations in the primaries are to be determined by a majority of the popular vote cast in said election; and if any candidate receive less than a majority, a second or "run-off" pri-

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mary must be held, at which the two candidates receiving the highest number of votes cast in the first election shall contest for the nomination.

"Sec. 9. That the central or State executive committee shall call a State convention of the political party it represents, the time of holding the convention to be within a period not earlier than the twentieth nor later than the thirtieth day following the date prescribed by this act for holding the second or run-off primary, which convention shall be composed of the delegates elected in the primary hereinbefore provided.

"Said State convention shall select party presidential electors, party delegates to the national convention; formulate a party platform, if it chooses; select central or State executive committeemen in the manner and upon the basis hereinbefore prescribed; declare nominations certified to it as prescribed by this act; determine contests over party nominations; pass upon questions involving the rights of delegates to sit in the convention, and exercise such other powers as may be necessary to the execution of its functions and the enforcement of this act, but not so as to impair or violate the directions, restrictions or limitations of the same."

Section 17, subsec. 7, invests the election officers with all the powers, duties, and privileges of election officers acting under the general election laws of the State, and are subjected to the same penalties for any act or deed declared by the general laws of the State as an offense in the case of the officers of regular State elections.

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Sections 20, 21, and 22 prescribe the qualifications of those who participate in the primaries.

Section 20 provides: "That no person shall be eligible to vote in the primaries provided for by this act, who shall not, at the time of the same, be qualified to vote in the next general election held under the laws of the State."

"Subsection 1. Each voter, before voting in the primary, shall produce the evidence required by the general laws of the State that he has paid the poll tax imposed upon him by law for the year next preceding the primary election; and also to establish if the registration law prevails in his voting precinct, that he has been duly registered in the same manner as in a general election under the laws of the State."

Section 21 provides that the electors in the primary shall vote in their districts, as required by the general laws of the State.

"Sec. 22. That it shall be unlawful for any voter in said primary to vote in the same, except with the party of his political affiliation; but this provision shall not apply so as to prevent any voter from changing his political affiliation by an open declaration to that effect made at the time he casts his vote to the judges of the primary, which change shall, by the clerks, be noted on the poll lists."

This section also makes provision for challenging voters and for keeping poll lists and tally sheets, the certification of the counts, and returns of the vote.

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Section 23 provides that one set of poll lists and tally sheets are to be sealed and addressed to the county court clerk and another set to the State board of primary election commissioners. Penalties are then prescribed for the punishment of any officer of election who is guilty of violating the requirements of the act.

Section 24 provides for the enforcement of the Dortch law or Australian ballot system wherever it applies to general elections.

The act in question also provides for the election of two primary election boards, prescribes the manner of their election, and defines their duties as follows:

"Sec. 10. That there shall be, and is by this act, created two primary election boards in and for the State of Tennessee, composed of three members each, and to be known respectively as the 'Democratic State board of primary election commissioners' and the 'Republican State board of primary election commissioners,' which said boards shall have and exercise the powers conferred and perform the duties prescribed by this act.

"Sec. 11. That the respective members of said State boards shall be elected by the vote of the general assembly in joint session prior to the first Monday of April, 1909, at a date fixed by joint resolution of said body; and thereafter by joint vote of the general assembly during each biennial session of the same there shall be elected one member of each of said boards on such date prior to the said first Monday of April as

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may be fixed, by the joint resolution of both houses or said body.

"Sec. 12. That the terms of office of the respective members of said boards first elected as hereinbefore provided shall be for two (2), four (4), and six (6) years, respectively, from the first Monday of April, 1909; the time of each member of the first elected board to be fixed when he is elected by the joint vote of the general assembly as hereinbefore provided; and thereafter the term of the members elected at each recurring biennial session of the general assembly shall be for six (6) years, and the members of said boards shall continue in office until their successors are elected and qualified.

"Sec. 13. That the members of said boards elected in the first election herein provided for and in succeeding elections or appointed to fill any vacancy shall be *bona fide* members of the political party which they are elected or appointed to represent.

"Sec. 14. That the vacancies occurring while the general assembly is in session shall be filled by the joint vote of the general assembly; those occurring while the general assembly is not in session, by the remaining members of the board in which the vacancy arises; vacancies leaving but one member of the board at the time, by the secretary of State, comptroller and treasurer; provided, however, the session of the general assembly succeeding the filling of a vacancy by appointment shall by its joint vote elect to supply the

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place theretofore filled by appointment. As soon as practicable after their election, and within fifteen days, the members of said board shall respectively qualify, convene and organize by the election of a chairman and a secretary, and a majority of said board shall constitute a quorum."

"Sec. 16. That the respective members of said State boards of primary election commissioners shall receive as compensation for their services the sum of two hundred dollars (\$200) each per annum, payable quarterly.

"Such other expenses as may be authorized by this act or necessarily incurred in the performance of the duties and functions prescribed shall become a State charge, to be presented by itemized statement, verified by the oath of the members, to the comptroller of the treasury, who, if the same is found correct, shall issue a comptroller's warrant therefor."

Section 26 provides that, before a candidate for the party nomination can become eligible to enter the primary or have his name placed upon the official ballot prescribed by the act, he is required to file in writing with the State board of primary election commissioners, or the county board of election commissioners, or with both, if he elect, his application to become a candidate in the primary, in which he should state his name, the office for which he desires nomination, his political affiliation, and the name of the political party whose primary he desires to enter. This application must be filed at least thirty days before the date of the first original primary.

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Section 34 provides that the manner of voting is the method known as the Australian ballot or Dortch system—namely, with a cross (X) mark opposite the name of the candidate.

Section 42 provides: "That such expenses as may be necessary to hold the primary provided for by this act, and not by provisions of the same made a State or county charge, shall be paid by the political party holding the same; but such expenses may be assessed by the committee or body having charge of the declaration of nominations against the candidates seeking the primary nomination, in fair proportion; but such assessment, if it is made at such time and with such reasonable opportunity as will permit a payment by the candidates, may be declared a condition against becoming the party nominee; provided, the assessment made against a candidate shall not exceed the following sums, to wit: For a county office or legislative member from a county, not more than ten dollars (\$10); senatorial and floterial representatives, not more than twenty dollars (\$20) for the district; for congressional district offices, not more than fifty dollars (\$50) for the district; State offices, not more than two hundred and fifty dollars (\$250); and for the office of the United States senator, not more than five hundred dollars (\$500); and in the event of a surplus the same shall be proportionately refunded to the candidates assessed.

"Sec. 43. That the respective counties of the State shall pay the necessary expenses incurred by county

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board of election commissioners in performing the duties prescribed by this act and *per diem* at the rate of one dollar per day to each member while in the actual discharge of such duties."

It will be observed that the act provides for:

(1) Two primary election boards, composed of three members each, which are appointed by the legislature.

(2) Central or State executive committees, chosen by the State convention in the prescribed ratio of two from each congressional district.

(3) District senatorial committees, composed of two members from each county of the district, constituted of members of the county executive committee selected by that committee.

(4) District flatorial committees, composed of two members from each county of the district, chosen in like manner.

(5) The county executive committee, elected by the people at the primary elections provided for in this act.

(6) State conventions, composed of delegates elected at the primary elections in the proportion of one delegate for every 100 or fraction of 50 votes or over cast in the presidential election next preceding the date of the primary election for the respective candidates for president.

We have thus endeavored to present the main features of this primary act, which is comprised in 49 sections, and embraces many details which we have

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not thought it necessary to mention, but have contented ourselves with a statement of its prominent features, for the purpose of giving a general view of this legislation, and which will sufficiently illustrate the arguments which have been leveled at its constitutionality.

The first ground of constitutional objection made to the validity of this act is that a compulsory primary election is an election within the meaning of the constitution of Tennessee, and hence must be tested by the provisions of the constitution relating to elections and qualifications of voters therein prescribed. The provisions of the constitution relied on by complainants are section 5, art. 1, declaring that:

“Elections shall be free and equal and the right of suffrage as hereinafter declared shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime,” etc.

Section 1, art. 4, also provides that:

“Every male person of the age of twenty-one years being a citizen of the United States and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of the election where he offers to vote satisfactory evidence that he has paid the poll tax assessed against him for such

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preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received."

The first inquiry, therefore, presented for our examination, is whether or not these provisions of the constitution have any application at all to primary elections. Admittedly no such thing could have been in contemplation by the framers of the constitution when they came to formulate the election and suffrage clauses of that instrument, for at that time no such thing as a primary election had ever been suggested. The object of this modern invention of political parties is primarily for the purpose of permitting and requiring the entire electorate of that party to participate in the nomination of candidates for political office. The plan is simply a substitution for the caucus or convention. It is true, as stated, it is a part of the political machinery that starts the candidate on his way, and the political party is thereby enabled to crystallize and concentrate its vote on that particular candidate who is chosen as the representative and expositor possibly of their political views; but the limitations and safeguards of the constitution apply exclusively to the final election when the officer is chosen in the mode required by the constitution. Is the legislature prohibited from exerting its inherent prerogative of legislation in a matter of such salutary concern to political parties by the fact that constitutional elections are hedged about with restrictions and limitations that

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are impractical when applied to the mere election of party candidates who shall be voted for in the constitutional election? It is fundamental and axiomatic that a State legislature is the reservoir of all the reserved power of the people, except as it may be limited and circumscribed by the State and federal constitutions. The reverse is true of the federal congress, which can only exercise such power as is expressly or impliedly conferred by the constitution of the United States. On this subject Mr. Cooley in *Constitutional Limitations*, at page 207, says:

"The lawmaking power of the State recognizes no restraints and is bound by none except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it."

The power of the legislature to pass a compulsory primary law arose in the case of *Kenneweg v. Allegany County*, reported in 102 Md., 122, 62 Atl., 250, wherein Chief Justice McSherry, in delivering the opinion of the court, said in part as follows:

"Had the general assembly the power to adopt the act of 1904 (chapter 508)? In a word, is the act in conflict with any provision of the State or the federal constitution? The act is an act amendatory of the public's local laws of Allegany county, and relates exclusively to the holding of primary elections in that

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county by the two leading political parties for the selection of candidates to be voted for at ensuing State and congressional elections. It places safeguards around and gives legal sanction to these primary contests. It prescribes how nominations are to be made by popular vote, how and upon what conditions candidates may enter those contests, and in what manner and at what times the votes cast thereat shall be counted and certified. . . . Enough has been said not the minute provisions, of this legislation; and we now repeat the question. Had the general assembly the power to adopt it? The general assembly possesses all legislative power and authority except in such instances and to such extent as the constitution of the State and of the United States have imposed limitations and restraints thereon. In this respect the legislature differs from the congress of the United States, which has and can exercise only such power as the federal constitution, expressly or by necessary implication, confers upon it. In the general assembly plenary power to legislate is vested unless restrained by the constitution. In the congress the power to legislate is not vested unless conferred by the federal constitution. In the State constitution we look, not for the power of the general assembly to adopt an enactment, but for a prohibition against its adoption. In the federal constitution we look, not for the prohibition, but for the delegated power to enact a measure.

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The general assembly being, then, the depository of all legislative power except when restrained by the organic law, it follows that it is clothed with full power to enact a primary election law, if there is no provision in the constitution depriving it of that authority. There is no such provision to be found in the constitution of the State."

In *Hanna v. Young*, 84 Md., 179, 35 Atl., 674, 34 L. R. A., 55, 57 Am. St. Rep., 396, it was held:

"The word 'election,' in the suffrage clause of a constitution providing that every male citizen of the United States of the age of 21 years and upwards, who has been a resident of the State for one year, etc., shall be entitled to vote at 'all elections,' includes one of those elections which the constitution itself requires to be held, or those which it has directed the legislature to provide for."

In *Montgomery v. Chelf*, 118 Ky., 766, 82 S. W., 388, the constitutionality of the Kentucky primary law was assaulted, but the court of appeals of that State held that the constitutional provisions in relation to elections had no application to primary elections for the selection of party candidates. The court said:

"That section of the constitution has no reference to primary elections, but applies only to general elections. . . . The constitution nowhere makes provision for holding primaries. Therefore, if the word 'election,' as used in the constitution includes primary elections, the constitution effectually prohibits the holding of primary elections at all."

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In *State, ex rel., v. Swanger*, 212 Mo., 472, 111 S. W., 7, the supreme court of that State upheld the validity of the State primary law.

In *State, ex rel., v. Jensen*, 86 Minn., 19, 89 N. W., 1126, the compulsory primary law of the State of Minnesota was upheld. The act in question was made applicable to political parties holding more than ten per cent of the total vote. On this subject the court said:

"We are of the opinion that the legislature may classify political parties with reference to difference in party conditions and numerical strength, and prescribe how each class shall select its candidates. . . . While it seems to some of us that the percentage of the votes selected as the basis of the classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification was arbitrary."

In *People v. Democratic General Committee of Kings County*, 164 N. Y., 335, 58 N. E., 124, 51 L. R. A., 674, one feature of the State primary law of New York was before the court of appeals of that State. Chief Justice Parker, in approving the statute, used this language:

"The dominant idea pervading the entire statute is the absolute assurance to the citizens that his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in ef-

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fective operation, in the primaries, the underlying principle of democracy which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upward, instead of permitting the leaders to construct it from the top downward."

In *State v. Felton*, 77 Ohio St., 554, 84 N. E., 85, 12 Am. and Eng. Ann. Cas., 65, the supreme court of Ohio had under consideration the primary election law of that State. The suffrage clause of the constitution of that State provided that "every male citizen of the United States of the age of twenty-one years who shall have been a resident of the State one year next preceding the election, and of the county, township or ward in which he resides such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections." It was argued that the State primary law superadded qualifications to those prescribed by the constitution, in that it required that the elector should have voted with the political party holding such primary at the last general election. The court on this subject said:

"If this construction is sound, then every elector has the constitutional right to vote at the primary election of every party. If the election is one at which merely the candidates of a party are to be selected, it cannot be an objection that electors who do not belong to that party are not permitted to take part. That was one of the evils that the legislature was intended to prevent,

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and as to the test for determining an elector's partisanship it is impossible to conceive of a political party without the possession by its members of some qualifications, and the test prescribed by the statute is the usual one and is not unreasonable. But a primary election held merely to name the candidates of a political party is not an election within the meaning of this section of the constitution. That section refers to the nomination of candidates."

The following excerpt from said opinion is pertinent:

"The national and State governments in the manner of their operation are quite different from what was contemplated in their organization. Political parties were not thought of, but so potent have they become in determining the measures and in administering the affairs of government that they are regarded as inseparable from, if not essential to, a republican form of government. In his 'The American Commonwealth,' Mr. Bryce says: 'In America the great moving forces are the parties. . . . The spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a locomotive engine; or, to vary the simile, party association, and organization are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. They transmit the motive power, they determine the directions in which the organs act. A description of them is therefore a necessary complement to an account of the constitution and

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government; for it is into the hands of the parties that the workings of the government has fallen. Their ingenuity, stimulated by incessant rivalry, has turned many provisions of the constitution to unforeseen uses, and given to the legal institutions of the country no small part of their present color.' ”

In *State v. Michel*, 121 La., 374, 46 South., 430, the court, in affirming the primary election law of that State, held that provisions requiring the State to pay part of the expenses of primary elections was valid; that provisions requiring voters to promise that they will support the nominees were valid; that provisions declaring their affiliations with the party holding the primary were valid; that provisions defining a political party to be one that shall cast at least 10 per cent of the votes cast for governor at the last preceding election were valid, etc.

The right of the legislature to require that nominations shall be by primary and to prescribe additional qualifications for the voters participating in same has been recognized by the weight of authority in the States of the Union. *Runge v. Anderson*, 100 Wis., 533, 76 N. W., 482, 42 L. R. A., 239; *State, ex rel. McCarthy, v. Moore*, 87 Minn., 308, 92 N. W., 4, 59 L. R. A., 447, 94 Am. St. Rep., 702; *State v. Drexel*, 74 Neb., 776, 105 N. W., 174; *Hopper v. Stack*, 69 N. J. Law, 562, 56 Atl., 1; *Coffey v. Dem. Gen. Com.*, 164 N. Y., 335, 58 N. E., 124; *Healey et al. v. Wipf* (S. D.), 117 N. W., 521; *Griffin v. Gesner*, 78 Kan., 669, 97 Pac., 794; *Walling v.*

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Lansdon, 15 Idaho, 282, 97 Pac., 396; *State v. Nichols*, 50 Wash., 508, 97 Pac., 728. In a note to *People v. Board of Election Commissioners*, 5 Am. and Eng. Ann. Cas., 568, the learned annotator says: "The weight of authority is to the effect that State legislatures have the general power to pass reasonable primary election laws, citing authorities."

Again, in a note to *State v. Felton*, 12 Am. and Eng. Ann. Cas., 73, the annotator again states that it is undoubtedly the general rule that State legislatures have the inherent power to pass reasonable primary election laws, citing many additional cases.

An examination of many of these cases has disclosed the fact that they are bottomed on two propositions, namely: (1) That such primaries are not in reality elections, but merely nominating devices; and (2) that they are valuable auxiliaries for the promotion of good government and are regulated by legislative enactment for the public welfare.

As against the array of authorities to the contrary, counsel cites the following cases, which hold that compulsory primary elections are "elections" within the purview of the constitution, and that the qualifications for voters in the primaries must be the same as the constitution of the State prescribes. *Johnson v. Grand Forks Co.*, 16 N. D., 363, 113 N. W., 1071, 125 Am. St. Rep., 662; *Spier v. Baker*, 120 Cal., 370, 52 Pac., 659, 41 L. R. A., 196; *State, ex rel., v. State Board of Canvassers*, 78 S. C., 461, 59 S. E., 145, 14 L. R. A. (N. S.),

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850, 13 Am. and Eng. Ann. Cas., 1133; *People v. Board of Commissioners*, 221 Ill., 9, 77 N. E., 321, 5 Am. and Eng. Ann. Cas., 562.

We do not subscribe to the reasoning of these cases, and, moreover, they are opposed to the great weight of authority.

When we recur to the election and suffrage clauses of the constitution of Tennessee, we find the first declaration in section 5, article 1, *viz.*: "That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto," etc.

Thereinafter this "right of suffrage" is declared, in section 1 of article 4, in these words:

"Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months, next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he resides."

The constitution in other places provides for the election of State officers and certain county officers, prescribing the mode of selection and term of service. Most of the officers provided for are to be chosen by the qualified voters of the State, districts, and counties, but some by appointment of the governor, some by the courts, and some by the vote of the general assembly.

It is very obvious, we think, that the suffrage clause of the constitution applies to elections referred to in

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that instrument and to such offices as may be created by the legislature, and these elections "shall be free and equal," and this right of suffrage, so defined, shall never be denied. It has never been supposed that the election and suffrage clause of the constitution applied to municipal corporations since it has been the practice of the legislature since the adoption of the constitution of 1870 to permit owners of real estate situated within the corporate limits to vote in a municipal election, independent of his place of residence or other qualifications.

The general act of 1875 (chapter 92) providing for the organization and regulation of municipal corporations, in its tenth section, carried into Shannon's Code at section 1952, provided (to quote the Code):

"All persons owning real estate [and] all persons living therein, and who have been residents thereof for six months previous to said election and who are entitled to vote for members of the general assembly, shall be entitled to vote in said election."

This is expressed in the act by a *proviso* in these words:

"Provided, however, that all persons living outside of municipal corporations, but owning property in the same, shall be entitled to vote in elections holden in such corporations."

The taxing district acts of 1881 (chapter 127) and 1885 (chapter 82) contain substantially the same provisions as to elections in such districts of commissioners and other district officers.

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And the present charter of the city of Nashville (McAlister & Smith's Laws of Nashville, p. 42, sec. 11 of Acts 1883, ch. 114), contains this provision:

"Nonresidents who shall have owned a taxable freehold in said city for six months previous to said day of election, and being qualified to vote for members of the general assembly by the laws of the State, shall be entitled to vote in the ward in which the said freehold is situated."

While this question has never been adjudicated in this State by any reported decision of which we are apprised, the practice of the legislature has been unchallenged. The question has arisen in other jurisdictions, and the constitutional provisions uniformly held not applicable to elections in a municipal corporation.

In Cyc., vol. 15, p. 303, it is said:

"A general law in regard to the registration of electors does not always apply to municipal and other local elections. It depends entirely upon whether there is anything in express terms or by necessary implication in the constitution or statute making the registration for such election necessary; in other words, it is a matter of constitutional or statutory construction."

In *State v. Dillon*, 32 Fla., 545, 14 South., 383, 22 L. R. A., 124, it was held that the suffrage provision of the Florida constitution, which was very similar to that of the constitution of Maryland—that is, to the effect that persons possessing the prescribed qualifications should be entitled to vote in "all elections"—did

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not apply to the election of municipal officers, but that "such elections are subject to statutory regulations and that it is competent for the legislature to prescribe the qualifications of voters at the same."

In *Mayor v. Shattuck*, 19 Colo., 104, 34 Pac., 947, 41 Am. St. Rep., 208, the question was upon the validity of an act providing for the annexation or consolidation of contiguous towns or cities and for the submission of the question of dissolution and annexation "to a vote of such of the qualified electors of such town or city (to be annexed) as have in the year next preceding paid a property tax therein."

The suffrage clause of the constitution was:

"Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections."

The qualifications then set out did not embrace the ownership of property or the payment of taxes. The court, in sustaining the act, said:

"It is manifest that some restrictions must be placed upon the phrase 'all elections,' as used in section 1 (of the constitution), else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with affairs of others in which he has no interest or concern.

"In our opinion the word 'elections' thus used does not have its general or comprehensive significance, including all acts of voting, choice or selection without

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limitation, but is used in a more restricted, political sense—as elections of public officers.” *Buckner v. Gordon*, 81 Ky., 665; *Wills v. Kalmbach*, 109 Va., 475, 64 S. E., 342, 21 L. R. A. (N. S.), 1009.

If these municipal elections are not within the meaning of the election and suffrage clauses of the constitution, it is difficult to perceive why a primary election which is not mentioned in that instrument, and wherein no officers are elected, but only nominated, should be included. It has already been shown that a large majority of the States of the Union have on their statute books primary election laws, some optional, some compulsory, some limited, but all exerting in some form or other legislative direction and control over party nominations and party machinery. The justifications for such laws is well stated in Cyc., vol. 15, p. 332:

“The legislature may recognize the existence of political parties and within reasonable limits regulate the means by which partisan efforts shall be protected in exercising individual preferences for party candidates, and this,” the authors said, “is the general purpose of primary election laws, which are designed to secure to individual voters a free expression of their will.”

The statute books of this State will show that commencing with chapter 407, Acts 1899, the general assembly has enacted several voluntary primary election laws. The last was passed on April 17, 1901, and ap-

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proved by Gov. McMillan on the same day, being chapter 39, Acts 1901. It is probable that this act superseded all prior laws on the same subject. It is true the act is not compulsory and is only utilized "whenever it shall be desired by the committee of governing authority of any political party to hold a primary election" is the language of the act. This act applied to both State and congressional elections and regulates with much detail party procedure in making political nominations. This act was before the court at the April term, 1907, at Jackson, in the case of *Whalen et al. v. State* (no opinion filed). Whalen and others, who were judges and clerks in a congressional primary held in Shelby county, were convicted in the lower court of stuffing the ballot box in violation of the provisions of that act. The conviction was upheld by this court and the judgment of the lower court affirmed. We are therefore of opinion, without further elaboration, that chapter 102, Acts 1909, is not obnoxious to the suffrage and election provisions of the constitution of the State, and was an act within the competency of the legislature to pass, other constitutional objections out of the way.

The next insistence is that several of the provisions of the act violate the inhibitions of the constitution against special and partial laws, in that its classifications are unreasonable, arbitrary, and capricious. Under this head the first specification is that section 1 of the act excludes from its benefits political parties cast-

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ing less than 10 per cent of the entire vote of the State at the preceding November election. It is said it is against public policy to deny the benefits and advantages of political organizations under compulsory primary laws to every tenth voter, to 10 per cent of all those who vote, and that it is an arbitrary and unreasonable denial of equal political rights to the members of the small excluded parties.

It is further said that, if organization by law and primary elections are good for strong parties and tend to promote the welfare of the government, like organizations and primaries are good for weak parties. Counsel cites in support of this assignment *Britton v. Board of Election Commissioners*, 129 Cal., 337, 61 Pac., 1115, 51 L. R. A., 116. This case from California is the only case cited by counsel in support of his proposition. As we have already seen, California is one of the few States which hold that a compulsory primary law forms a part of the general election laws of the State and is governed by all constitutional limitations in regard to the right of suffrage. *Spier v. Baker*, 120 Cal., 370, 52 Pac., 659, 41 L. R. A., 196. This is really the basis of the opinion in *Britton v. Board of Election Commissioners*, *supra*. In the latter case stress is also laid on the fact that the act before that court prohibited the minor political parties excluded from the benefits of the act from holding a nominating convention, and hence violated the constitution of California, which secured to all citizens "the right to freely assemble to-

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gether to consult for the common good," etc. Said the court:

"For the effect of the act here under consideration is not only to discriminate between political parties and the members thereof, but absolutely to work the disfranchisement of voters, or to compel them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise."

The act now under review is amenable to no such criticism. Under the Tennessee act minor political parties are not prohibited from making nominations in any manner deemed most expedient, nor are they deprived of the privilege of having the names of their candidates printed on the official ballots voted in the election. It is true they may not have their candidates nominated under this act, for the act is inapplicable to them, and unless the legislature could make no classification whatever, and must provide a primary board for any number of individuals, no matter how few, calling themselves a political party, there has been no vicious and invidious class legislation in this provision of the act. This question has frequently been decided adversely to complainants' contention. In *Kenneweg v. Allegany County*, 102 Md., 128, 62 Atl., 252, it was said of this objection to the primary law of Maryland, viz.:

"The circumstance that the act applies only to two of the political parties does (not) affect its validity.

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The general assembly has the power to pass an act regulating the primaries of one party alone, if it sees fit; and if for reasons satisfactory to the legislative branch of the government it is desirable that only the numerically stronger parties should be brought under the provisions of a primary election law which has to do merely with the selection of candidates to be voted for, and is in no way concerned with the elective franchise, it is not the province of the courts to declare the measure invalid simply because other political parties polling a few scattering votes are not included within the enactment."

In *State v. Felton*, 77 Ohio St., 572, 84 N. E., 88, the court in dealing with this feature of the Ohio primary law, said:

"One man cannot constitute a political party, and the abuses the law was intended to prevent depend largely upon the number of those who constitute the party, and this makes it perfectly proper for the legislature to limit the application of the law according to number." *State v. Poston*, 58 Ohio St., 620, 51 N. E., 150, 42 L. R. A., 237; *Gentsch v. State*, 71 Ohio St., 151, 72 N. E., 900; *DeWatt v. Bartley*, 146 Pa., 529, 24 Atl., 185, 15 L. R. A., 771, 28 Am. St. Rep., 814; *State v. Black*, 54 N. J. Law, 446, 24 Atl., 489, 1021, 16 L. R. A., 769; *State v. Anderson*, 100 Wis., 523, 76 N. W., 482, 42 L. R. A., 239; *Miner v. Olin*, 159 Mass., 487, 34 N. E., 721; *Corcoran v. Bennett*, 20 R. I., 6, 36 Atl., 1122; *Ladd v. Holmes*, 40 Or., 167, 66 Pac., 714, 91 Am. St. Rep., 457.

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We come now to some features of the act that present more difficulty.

It is next insisted that the act is unconstitutional for the reason it excluded the nomination of candidates for judicial offices and that after making this classification it then includes county judges. It is said this fact renders the classification arbitrary and capricious. If it be conceded that the legislature in the classification of candidates for political nominations in a primary election might lawfully exclude the judiciary, no reason is perceived why county judges, as members of the State judiciary, should not also be excluded. As already seen, the act provides for nominations by primary election of all party candidates for all State and county offices elected by the people excepting the judges of the supreme court, court of appeals, circuit, criminal, and chancery courts, and attorneys-general. It will be observed that in excepting the judiciary all the courts are mentioned except the judges of the county court. The objection is twofold: First, that it was an arbitrary and unreasonable classification to exclude the judiciary at all; but, second, if it was a reasonable and lawful exclusion, all the members of the class should have been excluded, and county judges should not have been excepted from the exclusion. The general rule on this subject was thus formulated in *Stratton Claimants v. Morris Claimants*, 89 Tenn., 497, 15 S. W., 87, 12 L. R. A., 70: "Whether a statute be public or private, general or specific, in form, if it attempts to create dis-

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inctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary. If the classification is made under article 11, section 8, of the constitution, for the purpose of conferring upon a class the benefit of some special right, privilege, or immunity or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under article 1, section 8, of the constitution, for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to that burden." If it be conceded, for the sake of argument, that the exclusion of the judiciary from the operation of a primary law enacted alone for political nominations was reasonable, then the entire judiciary must be excluded, and the exception of county judges was arbitrary and unreasonable. No valid reason can be suggested why county judges should not have been included in the exception excluding the judiciary. It is said, however, in opposition to this view that "county judges are not in any proper or essential sense judicial officers, . . . but their chief functions are simply those of financial agent of the county and chairman of the county court. They are county officers in as full and complete sense as sheriffs or trustees." It has been repeatedly held by this court that "the county judge is a member of the State judiciary, and none the

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less so because certain special duties are annexed to his office, which, were they the whole of his duties, might constitute him a mere county officer." *State, ex rel., v. Glenn*, 7 Heisk., 472; *State v. Maloney*, 92 Tenn., 68, 20 S. W., 419; *State v. McKee*, 8 Lea, 24; *State v. Leonard*, 86 Tenn., 485, 7 S. W., 453; *Johnson v. Brice*, 112 Tenn., 59, 83 S. W., 791.

It is said there was no valid reason for excluding the judiciary and attorneys general from the purview of the act. It has always been the policy of the State to separate the election of judges from the election of purely political officers. Prior to the adoption of the constitution of 1870 the judges were selected at the March election, while the governor and members of the general assembly were chosen at the August election. Under the constitution of 1870 the judges are required to be elected at the August election, while political officers are chosen at the November election. It was doubtless for the purpose of conforming to this policy of the State, as shown by the history of legislation on this subject, that the framers of this act excluded the judges.

We are of opinion there was a valid reason for the classification and exclusion of the judiciary from this act. The same may be said in respect to attorneys-general or district attorneys, who have always been recognized, and are, in fact, a part of the judiciary. We are of opinion, however, that the exclusion of county judges, probate judges, and special common-law courts

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and judges from this classification was arbitrary and capricious. If it was a reasonable classification to exclude the judiciary, then all the members of this branch of the public service should have been excluded. The legislature could not exclude a part and leave a part to be chosen in the primary. This is unquestionably the effect of the act.

It is next insisted that the body of this act is broader than its title and violates the two-subject clause of the constitution. Article 2, section 17, provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The title of the act under review is: "An act to establish a compulsory system of legalized primary law, for political nominations, to create the agencies for its operation and penalize its violation." The object of this bill, as indicated by its title, is: "To provide for the nomination of political candidates by compulsory primary elections, and create the agencies for its operation," etc. The body of the act has provided an elaborate plan for the nomination of party candidates by compulsory elections, and it has also provided agencies and instrumentalities for effectuating the system therein devised. All this is proper and germane to the main object expressed in the title. But in the ninth section of the act a subject is introduced which is wholly foreign to the title. It provides:

"1. For the holding of State conventions to—(a) select party presidential electors; (b) select party

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delegates to national conventions; and (c) formulate platforms, if they choose." Act, sec. 9.

Applying to the act the most liberal and latitudinarian construction, we fail to perceive wherein the holding of State conventions to select presidential electors and delegates to national conventions has any connection with the nomination of party candidates by popular primary election.

It is true the State convention is composed of the delegates chosen in the primaries, and one of the duties of the State convention is to declare nominations of State officers certified to it, as prescribed by the act, and it is said that the other things which the convention may do are things which such conventions always had the power to do. This position does not at all affect the proposition that the selection of presidential electors and delegates to the national convention has no sort of relevancy to the nomination of political candidates by popular primary election, the subject expressed in the title. Hence we are clearly of opinion that in this respect the body of the act is broader than the title. *Dixon v. State*, 117 Tenn., 81, 94 S. W., 936.

It is next insisted that the assessment of candidates for expenses of holding the primary election is unconstitutional and void. Section 42 of the act provides that the expense of holding the primary may be assessed against the candidates in fair proportion, and payment of the assessment may be declared a condition against becoming the party nominee. The whole has

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heretofore been set out, and the features above mentioned appear in the section. It is further provided that assessments against a candidate shall not exceed the following sums, to wit:

“For a county office or legislative member, from a county, not more than ten dollars (\$10); senatorial and floterial representatives, not more than twenty dollars (\$20) for the district; for congressional district offices, not more than fifty dollars (\$50) for the district; State offices, not more than two hundred and fifty dollars (\$250); and for the office of United States senator, not more than five hundred dollars (\$500); and in the event of a surplus, the same shall be proportionately refunded to the candidates assessed.”

The authority of the legislature to make such assessments against individuals as a condition of becoming a candidate for public office has frequently arisen in the courts. In *People, ex rel., v. Breckon*, 221 Ill., 9, 77 N. E., 321, 5 Am. and Eng. Ann. Cas., 562, the court, in dealing with this question, said:

“Other provisions of the act require a cash payment from persons desiring to become candidates for certain offices. It is provided that any one desiring to become a candidate for governor or United States senator, shall pay on filing a petition of legal voters a filing fee of \$100. Each congressional candidate must make a payment of \$100; each candidate for senator \$50; each candidate for member of the house of representatives \$25; and in Cook county a candidate for mayor must

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pay \$75, and a candidate for alderman \$25. These payments bear no relation to the services rendered in filing the papers, or the expenses of the election. They are purely arbitrary exactions of money, to be paid in the public treasuries as a monetary consideration for being permitted to be a candidate. The payments are not intended as compensation for services rendered in filing the papers, but the provisions make the ability and inclination of a person to pay money a test of his qualification and of the right of the voters to choose him for public office. Any eligible person has a right to be a candidate for a public office without being subject to arbitrary or unreasonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve. *People v. Williams*, 145 Ill., 573 [33 N. E., 849, 24 L. R. A., 492, 36 Am. St. Rep., 514]. . . . But there can be no discrimination between candidates based upon the ground that one has money to pay for the privilege of being a candidate and chooses to pay, and another has not the means or is unwilling to buy the privilege. . . . The provisions by which the candidates are required to buy their way to office are an unwarranted hindrance and impediment to the rights of the candidates and voters alike, and are illegal and void."

See, also, *Johnson v. Grand Forks County*, 16 N. D., 363, 113 N. W., 1071, 125 Am. St. Rep., 662.

We think this section is unconstitutional for the reason it makes an arbitrary, capricious, and unreasonable

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classification of candidates in providing that persons who are able to pay the prescribed fees may enter the primary, while other men who are equally capable and worthy are excluded because of their pecuniary inability to pay the prescribed fee. Such a law is unreasonable because the classification is arbitrary and oppressive.

The constitutional infirmities pointed out in this act go to its integrity, and no process of elision or excision can be applied which will rescue and preserve the remainder of the act. It results that for the reasons stated the act must be adjudged unconstitutional and void, and the decree of the chancellor is affirmed.

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NASHVILLE RAILWAY & LIGHT COMPANY v. W. E.
NORVELL *et al.*

(Nashville. December Term, 1909.)

- 1. TAXATION.** Back assessments of property covered by Acts 1907, ch. 602, must be made under it, and cannot be made under Acts 1903, ch. 258.

The general assessment law contained in Acts 1907, ch. 602, repealed the prior general assessment law contained in Acts 1903, ch. 258; and the provision, contained in Acts 1907, ch. 602, secs. 30, 31 and 38, for the back assessment of property for taxation, became, upon its enactment, the only law for the back assessment of any property covered by it, and property cannot be back assessed under said Acts 1903, ch. 258. (*Post*, pp. 617, 618.)

Acts cited and construed: Acts 1903, ch. 258; Acts 1907, ch. 602, secs. 30, 31, 38, and 79.

- 2. SAME.** Proceeding for back assessment commenced under a statute is not affected by its subsequent repeal, when.

A proceeding for the back assessment of property under Acts 1903, ch. 258, commenced before its repeal by Acts 1907, ch. 602, may be maintained notwithstanding such subsequent repeal, because the right is saved by statute (Shannon's Code, sec. 61.) (*Post*, pp. 618, 621.)

Code cited and construed: Sec. 61 (S.); sec. 47 (M. & V.); sec. 49 (T. & S. and 1858).

Acts cited and construed: Acts 1903, ch. 258; Acts 1907, ch. 602.

Cases cited and approved: *Richardson v. State*, 3 Cold., 122; *State v. Railroad*, 14 Lea, 56, 63; *State v. Bank*, 16 Lea, 111, 118; *Shelby Co. v. Railroad*, 16 Lea, 401, 410; *Wallace v. Goodlett*, 104 Tenn., 670, 681, 684; *State, ex rel., v. Taylor*, 119 Tenn., 229.

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- 3. SAME.** Acts 1905, ch. 513, for assessment of street railway properties is wholly prospective, and back assessments cannot be made under it.

Acts 1905, ch. 513, providing a new method of assessing the property street railway companies, not previously applicable to them, and by a new set of officers who before that had no jurisdiction over them, is wholly prospective in operation, and does not authorize a back assessment for a period antecedent to its enactment, though it provides that all back assessments of street railway properties must be made under it (*Post*, pp. 618, 619.)

Acts cited and construed: Acts 1905, ch. 513.

- 4. SAME.** Street railway property is not assessable or back assessable under Acts 1907, ch. 602, but is under Acts 1905, ch. 513.

Inasmuch as street railway property is assessable by the railroad tax assessors, under Acts 1905, ch. 513, it was not the intent or purpose of the legislature to provide for either the assessment or back assessment of street railway property under Acts 1907, ch. 602. (*Post*, pp. 619-621.)

Acts cited and construed: Acts 1905, ch. 513; Acts 1907, ch. 602, secs. 1, 2, 3, 4, 5, 21, 22, 23, 31, and 38.

Case cited and approved: *State v. Railroad*, 96 Tenn., 385, 407, 408.

- 5. SAME.** No back assessment of street railway property under Acts 1903, ch. 258, or Acts 1907, ch. 602.

There can be no back assessment of street railway property for the year 1904, under Acts 1903, ch. 258, because that act is no longer in force, in a case where the proceedings for back assessment were not begun before its repeal; and there can be no back assessment thereof under Acts 1907, ch. 602, because it does not cover this class of property. (*Post*, p. 621.)

Acts cited and construed: Acts 1903, ch. 258: Acts 1907, ch. 602.

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FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

J. M. ANDERSON and J. C. BRADFORD, for complainant.

ATTORNEY-GENERAL CATES, E. E. BARTHELL, L. A. LIGON, and T. B. LYTLE, for defendants.

MR. JUSTICE NEIL delivered the opinion of the court.

This is a proceeding to test the right of the trustee of Davidson county to back-assess the property of the complainant for the year 1904. We need not refer to the facts more particularly than to say that we may assume that the assessment of 1904 was insufficient to a degree that would make it the duty of this court to hold that there should be a reassessment by the trustee of Davidson county, if he has jurisdiction in the matter under the statutes of the State. He was about to make the back-assessment when he was enjoined by the chancellor. On final hearing this injunction was made perpetual. From this decree the county trustee, and the revenue agent, James R. Jetton, who was also made a defendant, appealed to this court.

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The back-assessment which was about to be made was attempted under chapter 602 of the Acts of 1907. The complainant contends that no power existed under that act because by its terms the property of street railway companies was excluded from its operation. It also insists that the power did not exist in the county trustee, because it was vested in express terms in the board of railway assessors by chapter 513 of the Acts of 1905. Defendants insist that a decision of this court rendered in 1907 (*State, ex rel., v. Taylor*, 119 Tenn., 229, 104 S. W., 242) held that the power existed under chapter 258 of the Acts of 1903, and that chapter 513 of the Acts of 1905 did not vest the power in the board of railway assessors. It is also insisted by defendants that the power exists under chapter 602, Acts of 1907.

As preliminary to a disposition of the questions suggested we shall briefly trace the history of the back-assessment law as it appears in our statutes.

The first act was chapter 79, Acts 1879. By this act all collectors of taxes were made assessors, to assess all property which by mistake of law or fact had not been assessed. This act was amended by chapter 181 of the Acts of 1883, so as to provide that all collectors of taxes, so made assessors, should back-assess, in case of omitted assessments, not only for the year for which such collector was acting, but for any previous year or years, and "for all the years for which taxes ought to have been paid upon such property." This latter act was amended by chapter 23 of the Acts of 1885, so as

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to provide that the back-assessment should not extend more than three years prior to the current year. The statutes of the same year contained an act (chapter 1) which provided (section 25) that, should it, at any time after the assessments for the current year had been made, come to the knowledge of the chairman or judge of the county court, the clerk of the county court, the county trustee, sheriff, or tax collector of any county of the State that any taxable property had not been assessed, as contemplated by the particular act, or had been assessed inadequately, the officers referred to should proceed to make adequate assessments. Similar provisions, confined to the current year, are found in several succeeding acts, viz.: Acts 1887, p. 34, c. 2, sec. 24; Acts 1889, pp. 157, 158, c. 96, sec. 26, and also section 48 of the same act; Acts 1895, c. 120, sec. 35; Acts 1897, p. 19, c. 1, sec. 26. It should be noted, however, that Acts 1889, c. 96, was so amended by chapter 27 of the special session of 1890 as to substantially make it general in its terms; that amendment being in substance the same as chapter 23, Acts of 1885, forbidding reassessments to be made further back than three years in addition to the current year. The sections upon the subject of back-assessments in the acts for all of the remaining years down to and including 1907 are general in their terms, each containing a complete scheme upon the subject, and by implication, if not in direct terms, repealing prior acts upon the subject: Acts 1899, pp. 1112-1115, c. 435, sec. 32; Id., p. 1159,

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sec. 82; Acts 1901, pp. 334-336, c. 174, sec. 31; *Id.*, p. 376, sec. 85; Acts 1903, p. 660, c. 258, sec. 31; *Id.*, p. 708, sec. 81; Acts 1907, pp. 2079-2082, c. 602, sec. 30; *Id.*, p. 2132, sec. 79. There was no general assessment law passed by the legislature of 1905. Each one of the successive acts last referred to operating as a repeal of prior acts upon the same subject, it resulted that when the act of 1907 became a law there remained no law but that act for the back-assessment of any property covered by it. There could therefore be no back-assessment under the act of 1903. The proceedings for back-assessment under that act which were considered in *State, ex rel., v. Taylor*, *supra*, were begun in 1906, and so were saved by Shannon's Code, sec. 61, which provides that "the repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced, under or by virtue of the statute repealed." *Richardson v. State*, 3 Cold., 122; *State v. Nashville Savings Bank*, 16 Lea, 111, 118; *Wallace v. Goodlett*, 104 Tenn., 670, 681, 684, 58 S. W., 343; *Shelby Co. v. R. R. Co.*, 16 Lea, 401, 410, 1 S. W., 32; *State v. R. R. Co.*, 14 Lea, 56, 63.

The view suggested and urged in complainant's brief is not a sound one, to the effect that the act of 1905 would prevent an assessment either under the act of 1903 or 1907, because it provides that all back-assessments of street railroad properties must be made under it. If such were the correct view, the court could never have decided *State, ex rel., v. Taylor*, as it did. No such

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view was argued, or even suggested, by the very able and experienced counsel who appeared for the street railway company in that case. Both court and counsel correctly assumed in that case that the act of 1905 was wholly prospective in its operation, as statutes usually are unless the contrary clearly appears. That act provided a new method of assessing the property of street railway companies, not previously applicable to them, and a new set of officers who before that had no jurisdiction over them. It would have been most remarkable if these officers had been required to back-assess street railway properties for a period anterior to 1905, since they would have been compelled to employ a method different from that laid down in prior acts; that is, they would have been compelled to employ the method provided by the act of 1905, and so, in case of a prior insufficient assessment, have compelled the same taxpayer to submit to two different forms of assessment of the same property for the same year. It would have to appear very clearly to the court that such was the intention of the legislature before we would recognize such a course of action. Moreover, if such were the intention of the legislature, it is far from certain that two methods so different could be administered together, and it would probably be true that the act so construed would be ineffective because incapable of enforcement.

So the case recurs upon the question whether this property can be back-assessed under the act of 1907. The solution of this question depends upon whether that act applies to street railway property. It is in-

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sisted for defendants that it does so apply. We are of the opinion that it does not. It is true that section 1 of the act provides that all property, real, personal, and mixed, except that exempted under section 2, shall be taxed; that section 3 provides that personal property, privileges, and polls shall be assessed annually, and real estate every two years; and that section 4 provides that all property shall be assessed at its actual cash value. But section 5, which is addressed to the basis of assessment, excepts, in subsection 4 thereof, such properties as are assessable by the railroad assessors, providing, however, in respect of one of these, street railway property, that it shall be assessed in the city or town wherein the principal part of it lies, although the office of the company be outside of the said city or town; and section 21, which is specially directed to the method of assessing quasi public corporations, expressly exempts, in its proviso, the property of street railway companies, interurban electric railways, telegraph, and telephone companies, because assessable under "other laws." It is true the same proviso excepts from the operation of the section building and loan companies, and insurance, manufacturing, and banking companies, but does this on the ground that they are covered by sections 22 and 23 of the same act. On turning to these sections we find such to be the fact. When we turn to section 31, which, as supplemented by section 38, contains the law of back-assessments, we see that it applies only to "property or properties included in this act." We have found that street railway properties are not

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included in the act, because they are of the class to be assessed by the railway assessors. Compare *State v. Railroad*, 96 Tenn., 385, at pages 407 and 408, 34 S. W., 1023. We have examined all of the sections of the act of 1907 referred to in the brief of learned counsel for defendants, and, indeed, the whole act, and, while there are expressions here and there favoring defendants' contention, we think it very clear from the whole act that it was not the purpose of the legislature to provide for either the assessment or back-assessment of street railway property under this act, but that the lawmaking body had in mind chapter 513 of the Acts of 1905, and did not intend to take from the officers therein referred to the assessment of the class of property therein provided for. We think that in so drawing the act the legislature overlooked the fact that there could be no back-assessment of this class of property for the year 1904, that year falling in a chasm, as it were, between the acts of 1903 and 1905, after the emasculation of the former act by the passage of the act of 1907; but this cannot change the legal result. To conclude: There can be no back-assessment of the property in question for the year 1904, under the act of 1903, because that act is no longer in force, and the proceedings to back-assess were not begun before its repeal, and there can be no back-assessment under the act of 1907 because it does not cover the class of property in question.

It results that the decree of the chancellor must be affirmed.

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JIM PENNEL v. STATE.

(Nashville. December Term, 1909.)

1. CRIMINAL LAW. Plea in abatement to indictment for irregularities in selecting grand jury must be made at the first opportunity.

A plea in abatement to an indictment raising objection to the formation of the grand jury finding and preferring the same, or upon the ground of irregularity in selecting the grand jury, must be seasonably interposed, and must be made at the first opportunity.

Cases cited and approved: *Ransom v. State*, 116 Tenn., 359; *Rivers v. State*, 117 Tenn., 235; *Agnew v. United States*, 165 U. S., 36.

Case cited and distinguished: *Crowley v. United States*, 194 U. S., 461.

2. SAME. Same. Case in judgment where such plea in abatement comes too late.

A plea in abatement for irregularities in selecting the grand jury, as shown in the preceding headnote, filed more than two months after the return of the indictment, and after the defendant's arraignment and plea of not guilty, after the impanelment and oath of the trial jury, and after his plea of not guilty was withdrawn by leave of the court, comes too late, though Acts 1897, ch. 121, allows pleas in abatement and in bar to be filed at the same time.

Acts cited and construed: Acts 1897, ch. 121.

Case cited and approved: *Turner v. State*, 111 Tenn., 593.

3. SAME. Requisites of pleas in abatement.

Pleas in abatement are strictly construed, and must possess the highest degree of certainty known to the law in every particular, and they must exclude, by proper allegations and aver-

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ment, every legal intendment or conclusion that might otherwise be made against them by the court. (*Post*, p. 631.)

Cases cited and approved: *State v. Willis*, 11 Humph., 222; *Smartt v. State*, 112 Tenn., 539.

4. **SAME.** Plea in abatement to indictment for irregularities in selecting grand jury must negative earlier opportunity to file it, when.

A plea in abatement to an indictment for irregularities in selecting the grand jury, filed more than two months after the return of the indictment found, is fatally defective, if it fails to aver that it was filed at the earliest opportunity after knowledge of the indictment, or if it fails to negative the existence of an opportunity to file such plea earlier, or fails to aver the want of knowledge of such irregularity before the arraignment, plea of not guilty, and impanelment of the trial jury. (*Post*, pp. 631, 632.)

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County.—W. M. HART, Judge.

J. H. ZARECOR and JAMES NEWMAN, for Pennel.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This cause is before us on appeal, and the only error assigned is to the action of the trial judge in overruling the defendant's plea in abatement to the indictment upon which he was convicted. This plea is as follows, viz.:

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"STATE OF TENNESSEE v. JIM PENNEL

"Comes the defendant, Jim Pennel, in proper person, and for plea to the indictment filed in this case says it is invalid and void for the following reasons:

"(1) That the thirteen members constituting the grand jury that found and returned the indictment in this case were appointed by the judge of the criminal court of Davidson county and not formed (drawn) by lot.

"(2) That the members constituting the grand jury that found and returned the indictment in this case were appointed by the judge of the criminal court of Davidson county, Tennessee, from a list of names reported by the board of jury commissioners of said county to the clerk of the criminal court as the panel of grand and petit jurors for said term, and duly summoned by the sheriff of said county to attend said court under a writ of *venire facias* issued to him by the clerk of said court; that said judge appointed, selected, and designated from said list said thirteen names as the regular grand jury for said term, without directing the names of all the jurors in attendance at said term, which were more than thirteen, to be written on scrolls and placed in a box, or other suitable receptacle, and drawn by a child under ten years of age.

"(3) That the chairman of the board of jury commissioners of said county failed to deliver in open court, to the judge of said court, on the first day of the term thereof, the slips or scrolls in a sealed envelope,

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on which was written the names of the jurors drawn by said board, and the judge of said court failed to compare the list contained in the report filed with the clerk with the names on said slips, or scrolls, before he appointed the grand jury in this case.

"Wherefore defendant prays judgment on his said plea, and that said indictment be abated and quashed."

This plea was properly verified by the oath of the defendant below. In support of it the counsel for plaintiff in error, at the bar and on brief, in an able and critical manner, has brought to the attention of this court the various statutory and Code provisions prescribing the mode of selecting grand jurors, and insists that the grand jury which found the indictment in this case was organized in disregard of these provisions, and that his conviction, resting as it does on this indictment, was unwarranted and inoperative in law. Without conceding the soundness of this contention, the attorney-general answers that the plea cannot avail the plaintiff in error to raise the question thus presented to the court, for two reasons: First, because not seasonably filed; and, second, because it fails to negative certain essential matters to be hereafter mentioned.

With regard to the first of these insistences, the record shows that the indictment in question was returned by the grand jury on October 13, 1909, and that the defendant did not file his plea in abatement, or otherwise offer any objection to the manner in which the grand jury was selected, until December 20, 1909—a

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period of two months and seven days—and then not until after he was arraigned, had entered a plea of not guilty, and a jury had been impaneled and sworn to try the issue upon this plea. It was only after all these steps had been taken he obtained leave of the court to withdraw his plea of not guilty and file a plea in abatement.

In the case of *Agnew v. United States*, 165 U. S., 36, 17 Sup. Ct., 235, 41 L. Ed., 624, where the indictment was returned against the defendant December 12, 1895, and he filed a plea of abatement on December 17th following, alleging irregularities in drawing the jurors, it was held that the plea came too late. Mr. Chief Justice Fuller, in the opinion in that case, quoted with approval from Wharton's Criminal Procedure and Practice, secs. 344-350, as follows: "Material irregularities in selecting and impaneling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array, or by motion to quash, or by plea in abatement; that the question of mode in which such objections are to be taken largely depends upon local statute, but that certain rules may be regarded as generally applicable. One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found the exception may be too late; but when he

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has had no opportunity of objecting to the bill found, then he may take advantage of the objection by motion to quash, or by plea in abatement — the latter in all cases of contested fact being the proper remedy.”

The authority of this case was recognized and the rule announced therein was applied by this court in *Ransom v. State*, 116 Tenn., 359, 96 S. W., 953, and *Rivers v. State*, 117 Tenn., 235, 96 S. W., 956.

In the first of these cases, the murder of which Ransom was accused was committed on August 1, 1905, and within twenty-four hours thereafter he was arrested and bound over to the next term of the criminal court, which convened on September 4, 1905. On the first day of that term the court selected from the venire a grand jury to serve during that term. On the 8th of September the grand jury returned a true bill, charging Ransom with the crime of murder in the first degree. Thereafter Ransom demanded a special panel, and on the 21st of October, 1905, the court ordered that the jury books be brought into open court and a panel drawn therefrom, to be summoned by the sheriff to appear October 24, thereafter, on which day the case had been set for trial. On that day Ransom, through his counsel, presented for the first time an objection to the grand jury, viz., that all persons of African descent had been excluded therefrom. This objection, in the form of a written motion to quash the indictment, was overruled by the trial judge, and his action upon appeal from a judgment of conviction was made

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the basis of an assignment of error in this court, when it was held that the ruling of the trial judge could not be impeached for two reasons, one of which was that the objection to the formation of the grand jury was not seasonably interposed.

In *Rivers v. State*, supra, the same objection was offered to the constitution of the grand jury as that presented in Ransom's Case. It appeared from the record that Rivers was brought into open court on September 30, to answer the State on the charge of murder, and entered into recognizance with sureties of his appearance. The indictment was not returned by the grand jury until November 18, 1904. The defendant filed no plea and made no objection to the constitution of the grand jury until January 16th following, at which time another term of the court was in session. On these facts appearing in the record, this court, on the authority of the cases of Agnew and Ransom, supra, held that the plea in abatement came too late.

In each of the cases referred to above it appears that the defendant had been committed to await the action of the grand jury prior to its organization, and thus had notice that the grand jury would be called upon to act upon an indictment against him. The present case, however, is to be distinguished, as it does not appear from the record whether or not plaintiff in error, Pennel, was committed in advance of the meeting of the grand jury; but it is disclosed, as has already been stated, that the indictment was returned against

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him two months and seven days before he filed his present plea in abatement, or made any other objection to the constitution of the grand jury.

It is insisted by counsel for the plaintiff in error, that the distinction just pointed out radically distinguishes the present case from those of Ransom and Rivers, *supra*, and that the opinions in those cases cannot be relied upon as authority for the contention of the State on this point. Those cases, however, announce the general rule that, in order to avail the defendant, his plea in abatement must be seasonably interposed, and applied it to the facts disclosed; but it by no means follows that it will only be enforced where long lapses of time have intervened between the commencement of the criminal proceedings and the filing of the plea challenging the organization of the grand jury. In each case which is presented, the question is whether the defendant has availed himself of his first opportunity to make objection as to the regularity in the composition of the grand jury which has preferred the indictment against him. If the record shows that he has not done this, then upon the authority of these cases, as well as of the text-book authors who have written on the subject of criminal procedure, his plea must fail.

It is said, however, that the authority of *Agnew v. United States*, *supra*, has been overthrown by the later case of *Crowley v. United States*, 194 U. S., 461, 24 Sup. Ct., 731, 48 L. Ed., 1075, and that this necessarily breaks the force of the Ransom and Rivers cases, rest-

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ing as they did upon that of Agnew. It will be seen, however, upon an examination of the opinion in the Crowley Case, that the early or Agnew Case is not mentioned. The facts of the two cases were entirely dissimilar. In the early case no question was made in the plea in abatement as to the personal disqualification of the grand jury which found the indictment. In the later, however, the objection was made that the grand jurors were disqualified by the statute of Porto Rico, in one of whose courts the trial was had. In the Agnew Case, the plea in abatement was not filed until five days after the indictment was returned, and it did not allege want of knowledge of the threatened prosecution, nor want of opportunity to present his objection earlier, nor did it assign any ground why exception was not taken or objection made before; while in the Crowley Case "the accused was not in court when the grand jurors were selected and the grand jury impaneled. So far as appeared from the record, he was not aware that his case would be taken up by the grand jury. . . . His objection to the qualification of the grand jurors was made promptly—three days after the indictment was returned—before he was arraigned, and as soon as he learned of the fact upon which the objection was based." Thus it will be seen that the court here clearly indicates a recognition of the rule that such a plea must be seasonably interposed. In the case at bar, not only was the defendant arraigned upon the indictment in question and entered his plea of not guilty, but it was

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only after a jury was impaneled and sworn to try the issue joined that, upon motion, he was permitted to withdraw that plea and then file his plea in abatement. We think, upon all these authorities, that this plea came too late. Even if it were granted that the conclusion above announced was unsound, yet we think that the plea was fatally defective in its lack of essential averment. In Bishop's New Criminal Procedure, vol. 1, sec. 884a, it is said: "If the want of an opportunity to challenge the panel is an element in the right to maintain the plea, the existence of such opportunity must be negatived." In *State v. Wills*, 11 Humph., 222, it is said by this court: "Pleas in abatement are not favored by law. They are construed with much strictness, and must possess the highest degree of certainty known to law in every particular. They must exclude, by proper allegations and averment, every legal intentment or conclusion that might otherwise be made against them by the court." See, also, *Smartt v. State*, 112 Tenn., 539, 80 S. W., 586.

In the case at bar, plaintiff in error does not aver want of knowledge of the competency of the grand jury before his arraignment and plea of not guilty, nor lack of opportunity to present his objection earlier. It is true that it does not appear from the record that prior to the assembling of the grand jury he had been arrested for the offense for which he was indicted; but, as has already been stated, the record shows that two months and seven days elapsed between the return of

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the indictment and the interposition of his plea. In view of this period of time thus intervening, we think it was incumbent upon him to aver that his plea was filed at the earliest opportunity after knowledge of the existence of the indictment was brought home to him.

It is said, however, that the plea in abatement in the present case was seasonably filed, under chapter 121 of the Acts of 1897, which provides that "a defendant can in any suit plead both in abatement and in bar at the same time; and the plea in bar is no waiver of the plea in abatement, and when so pleaded both pleas shall be heard at the same time and judgment rendered in each plea."

This statute, however, cannot avail the defendant in this case, because his pleas in abatement and in bar were not filed at the same time. It is true that both were filed on the same day; but the plea in bar was first filed, and the cause, as has been seen, had proceeded to the impaneling of the jury to try the issue raised by that plea. It was after the withdrawal of that plea that the plea in abatement was filed. If, however, both pleas had been filed at the same time, the question still would be, as to the plea in abatement, whether it was seasonably filed and in other respects contained the elements essential to such a plea. The case of *Turner v. State*, 111 Tenn., 593, 69 S. W., 774, while holding that the statute in question applied to both criminal and civil cases, did not intimate that of the change of practice effected by this act that the

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rules invoked by the State in this case were to any extent or in any respect modified or affected by the terms of that act.

We think that there was no error in the action of the trial judge in holding the plea in the present case insufficient in law, and his judgment in every respect is therefore affirmed.

Austin v. Shelton.

S. C. AUSTIN v. P. A. SHELTON, County Court Clerk,
*et al.*¹

(Nashville. December Term, 1909.)

1. **STATUTES.** Legislative intent determined from practical construction of previous, kindred, and contemporaneous legislation, when.

The determination of the question whether a beverage or liquid which contains a small percentage of alcohol, but unquestionably nonintoxicating, is a liquor in the sense of the revenue law (Acts 1909, ch. 479, sec. 4) imposing a privilege tax upon liquor dealers, depends upon the legislative intent as expressed in the statute imposing the tax, construed in the light of previous revenue laws imposing privilege taxes upon liquor dealers, and the practical construction given to them by those whose duty it was to enforce them, and by the courts of the State, and kindred and contemporaneous legislation concerning the sale of liquors, enacted from time to time by the general assembly. (*Post*, p. 639.)

2. **SAME.** Same. Privilege tax imposed upon "liquor dealers" is construed to apply to sellers of intoxicating liquors, and not to sellers of nonintoxicating liquors.

Where a statute (Acts 1909, ch. 479, sec. 4) imposes a privilege tax upon liquor dealers, and defines liquor dealers to be "every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale," and expressly provides that nothing in the statute "shall authorize or legalize the sale of liquors," when interpreted according to the rule stated in the foregoing headnote, and in the light of such previous revenue laws, their practical construction, and in the light of the kindred and contemporaneous legislation, the terms "liquors" and "liquor dealers" must be construed as limit-

¹Upon the general question, what liquors are within statutory restrictions as to the sale of spirituous, vinous, fermented, and other intoxicating liquors, see note to *Lemly v. State* (Miss.), 20 L. R. A., 645.

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ed to beverages and persons selling beverages containing a sufficient quantity of alcohol to make the beverage intoxicating, so that a vendor of soft drinks containing a small percentage of alcohol, insufficient in quantity to render the liquors intoxicating, is not liable for such tax.

Acts cited and construed: Acts 1909, ch. 479, sec. 4.

Other acts cited as in aid of the construction of said act are as follows: Acts 1877, ch. 23; Acts 1899, ch. 161; Acts 1903, ch. 257; Acts 1907, ch. 541; Acts 1909, chs. 1, 14, and 385.

Code cited and construed: Secs. 6785-6787, 6795, 6797 (S.); secs. 5672, 5673, 5681 (M. & V.); secs. 4862, 4863 (T. & S. and 1858).

Cases cited and approved: *Grills v. Mayor*, 8 Bax., 247; *State v. Rauscher*, 1 Lea, 96; *Webb v. State*, 11 Lea, 662; *Hatcher v. State*, 12 Lea, 367; *Harrison v. State*, 96 Tenn., 548; *Webster v. State*, 110 Tenn., 506; *Pressly v. State*, 114 Tenn., 535; *Foster v. Speed*, 120 Tenn., 470.

3. **SAME. Same. Same.** Extension of statute so as to include dealers in nonintoxicating liquors would be judicial legislation. While, as an abstract proposition, any beverage which contains any spirituous, vinous, or malt liquor, however small the percentage thereof may be, comes within the letter of the statute imposing privilege taxes upon liquor dealers, it does not come within its intent and spirit, as shown in the foregoing headnotes, and to extend the statute so as to include dealers in nonintoxicating liquors would be judicial legislation. (*Post*, p. 644.)

4. **INTOXICATING LIQUORS.** Dealers subject to privilege tax; question of proof in each case.

The beverage sold, to make the seller liable for the privilege tax imposed upon liquor dealers, must be one that is intoxicating; and whether or not it is intoxicating is a question of fact, to be determined upon the proof in each and every case in which it arises, just as if the sale was one of bitters, which does not make the dealer liable, unless the bitters are intoxicating. (*Post*, p. 645.)

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5. **SAME.** Prima facie presumption that licensee under a federal license is a liquor dealer is rebutted by proof that the liquors sold were nonintoxicating.

The provision in the statute that the procuring of a United States revenue license authorizing the licensee to become a wholesale or retail liquor dealer shall be *prima facie* evidence that the licensee is such a liquor dealer makes such license only *prima facie* evidence of the fact, which may be rebutted by proof, admission, or concession that the beverages sold were nonintoxicating, which fully meets and overcomes such *prima facie* case. (*Post*, pp. 638, 645.)

Acts cited and construed: Acts 1909, ch. 479, sec. 4.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—JOHN ALLISON, Chancellor.

JNO. J. VERTREES, J. C. BRADFORD, W. C. CHERRY,
FRANK LANKFORD, HILL MCALISTER, and J. M. ANDER-
SON, for complainant.

ATTORNEY-GENERAL CATES, PITTS & MCCONNICO, J. N.
FISHER, E. E. BARTHELL, and SAMUEL N. HARWOOD, for
defendants.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

This case involves the liability of complainant for a privilege tax imposed upon liquor dealers by the general revenue law, chapter 479, Acts 1909.

The provision of this statute imposing this tax, and defining who are liquor dealers, is as follows:

"Sec. 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation of such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue. . . .

"Liquor Dealers.

Wholesale, and, in addition, taxed as other merchants \$500 00

Retail, taxed as other merchants, and, in addition, shall pay as follows:

In cities, taxing districts, or towns of 6,000 inhabitants or over, each, per annum 500 00

At any place, city, taxing district or town of less than 6,000 inhabitants, each per annum 500 00

Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or watercraft or from railroad cars, shall pay a tax, each, in lieu of all other taxes to be paid in any county they may elect, per annum 500 00

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"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers, and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine, where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"Provided, they shall not sell in quantities of less than one and a half ($1\frac{1}{2}$) gallons.

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail dealers shall be taken as *prima facie* evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal revenue license, he shall have a right to collect the taxes by distress warrants.

"Provided, that nothing in this act shall authorize or legalize the sale of liquors."

Complainant was engaged in business in the city of Nashville, and dealt in and sold beverages conceded to

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be what are known as soft drinks, also spirituous, vinous, and malt liquors, or beverages containing alcohol, some less than one-half of one per cent, and others more than that, but all less than two per cent, all of which were nonintoxicating. He had a United States revenue license as a retail liquor dealer, required by the internal revenue laws of all persons engaged in the sale of beverages or liquors containing more than one-half of one per cent. of alcohol, which he had obtained because some of the beverages sold by him contained more than that percentage of alcohol. The tax was paid by him under protest, and this suit was brought to recover it.

The question here presented is whether one engaged in the sale of beverages containing a small per cent. of alcohol, in this case less than two per cent., but which are unquestionably nonintoxicating, is a liquor dealer within the meaning of the law, imposing a privilege tax upon liquor dealers, or, in other words, whether a beverage or liquid which contains a small percentage of alcohol, but nonintoxicating, is a liquor in the sense of that law.

The determination of this question depends upon the legislative intent as expressed in the statute we are interpreting, construed in the light of previous revenue laws imposing privilege taxes upon liquor dealers, and the practical construction given them by those whose duty it was to enforce them, and by the courts of the State, and kindred and contemporaneous legislation concerning the sale of liquors, enacted from time to time by the general assembly.

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The contentions restated are, upon the part of the defendant, that all beverages and liquids which are to any extent spirituous, vinous, or malt, regardless of whether they are intoxicating, are within the statute; on the part of complainant, that such beverages are not within the statute unless the percentage of alcohol contained makes them intoxicating.

We are of opinion that complainant's contention is sound, and our reasons for so holding are these:

For years past, the word "liquor" and the term "liquor dealer" have been used in the revenue laws of this State imposing a privilege tax upon the sale of liquors, and have been understood by the people at large, to mean intoxicating liquors, and dealers in such liquors.

They have been used in various statutes and in judicial decisions as meaning the same thing. Shannon's Code, secs. 6785, 6786, 6787, 6795, 6797; Acts 1899, c. 161; *Hatcher v. State*, 12 Lea, 367; *Webster v. State*, 110 Tenn., 506, 82 S. W., 179; *Harrison v. State*, 96 Tenn., 548, 35 S. W., 559; *State v. Rauscher*, 1 Lea, 96; *Grills v. Mayor*, 8 Baxt., 247; *Webb v. State*, 11 Lea, 662; *Pressly v. State*, 114 Tenn., 535, 86 S. W., 378, 69 L. R. A., 291, 108 Am. St. Rep., 921; *Foster v. Speed*, 120 Tenn., 470, 11 S. W., 925, 22 L. R. A. (N. S.), 949.

The statutes above referred to, prohibiting the sale of liquors to students, minors, habitual drunkards, within four miles of a schoolhouse, and within two miles of a hospital, evidence this fully. Those in relation to students, minors, and sales within two miles of hospi-

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tals merely prohibit the sale of vinous, spirituous, or malt liquors; while the others prohibit the sale of intoxicating liquors, yet all these statutes were passed for the same purpose—protection of certain persons from the habit, use, and temptation of intoxicants.

Chapter 161, Acts 1899, makes it a misdemeanor to sell intoxicating liquors without a license, or payment of a privilege tax, although the revenue law does not contain the word “intoxicating.”

The privilege tax upon liquor dealers, for more than thirty years, has been imposed for the twofold purpose of revenue and controlling and restricting the sale of liquor, and especially in aiding in the enforcement of what is known as the “four-mile law,” which prohibits in terms the sale of intoxicating liquors. *Foster v. Speed*, 120 Tenn., 470, 111 S. W., 925, 22 L. R. A. (N. S.), 949.

The first four-mile law was enacted in 1877, and applied to a small part of the territory of the State, but by amendments it was extended from time to time, and, when the general assembly of 1909 met, had been made to apply to all the State, except four cities.

As these amendments were made, and the sale of liquors restricted, the privilege tax was increased in furtherance of the enforcement of the law prohibiting the sale of “intoxicating liquors.”

The general assembly of 1909 passed January 13, 1909 (Acts 1909, c. 1), a new four-mile law, prohibit-

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ing the sale of intoxicating liquors, including wine, ale, and beer, as a beverage, within four miles of a school-house, public or private, where school is kept, in the State, and operated as a prohibition of the sale of intoxicating liquors in every part of Tennessee.

Afterwards, February 5, 1909, a statute was enacted (Acts 1909, c. 14) providing "that all money paid for licenses for a term after July 1, 1909," by liquor dealers, is directed to be returned to them, less that for the time they have done business thereunder before the passage of the law "prohibiting the sale of intoxicating liquors within the State." The licenses here referred to were those issued under the revenue law of 1907 to "liquor dealers." The revenue statute we are now considering was enacted by the same general assembly May 1, 1909, and the provisions in regard to "liquor dealers" must be construed in connection with the other legislation upon the same subject.

We will now proceed to examine the provision of the statute under which the tax sued for was collected.

The subject of the tax imposed is "Liquor Dealers." The tax is upon the sale of "liquors," and to be paid by "liquor dealers." The statute declares "that every person, company or firm, selling spirituous, vinous or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale, is a liquor dealer." The terms "spirituous, vinous or malt liquors" (the latter includ-

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ing beer or ale), interpreted in the light of the previous legislation upon this subject and its accepted meaning and construction, clearly mean and refer to intoxicating liquors. This is evident from the use of the word "intoxicating" in referring to bitters, and the words "medicated or adulterated" in referring to cider. It is well known that beverages which are intoxicating are sold under the name of "bitters" and "cider," for the purpose of evading the law, and the use of the words named in this connection is intended to prevent such evasion. No such words are used in referring to "spirituous, vinous or malt liquors;" the general assembly assuming that they implied that the beverages so described were intoxicating, because the words had been for years used in that sense.

This subsection closes with this:

"Provided, that nothing in this act shall authorize or legalize the sale of liquors."

This proviso is not to be found in the revenue statutes of 1903 and 1907 (none was enacted in 1905), because, when they were passed, intoxicating liquors could be legally sold in the large cities of the State, and therefore this proviso, or saving clause, was not necessary or proper. When the present law was enacted, January 13, 1909, there could be no legal sales in any part of the State. Therefore the privilege tax imposed, and here involved, was laid upon those selling intoxicating liquors solely for the purpose of aiding the enforcement of that statute, which, as stated, extended only to the prohibition of intoxicating liquors, which is clearer from

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the fact that the tax heretofore was graduated according to the size of the city where the sale was lawfully made; the present act imposing the same amount on sales made at any place within the State.

Chapter 385, Acts 1909, passed April 29th, also throws light upon the subject. By it the district attorneys of the State are required to procure from the internal revenue collector for the district of Tennessee certified copies of the records of that office, showing the name of each person, firm, or corporation to whom internal revenue licenses for the manufacture or sale of "spirituous, vinous or malt liquors has been issued," to be used in the prosecution of persons for violation of the laws of the State prohibiting the "manufacture or sale of intoxicating liquors, spirituous, vinous, or malt, within the State." And this, whether the law violated was the "four-mile law," or chapter 161, Acts 1899, making it a misdemeanor to sell intoxicating liquors without payment of the privilege tax imposed upon liquor dealers. The requirement is that a list of all persons who have been licensed to deal in "spirituous, vinous or malt liquors" be procured; but its use is only in prosecutions for violation of laws prohibiting the sale of intoxicating liquors.

While, as an abstract proposition, any beverage which has to any extent, however small the percentage may be, spirituous, vinous, or malt, comes within the letter of the statute, it does not come within its intent and spirit, and to extend it would be judicial legislation.

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The general assembly could impose a tax upon the sale of beverages containing any percentage of alcohol, and doubtless such an act would contribute much to the enforcement of the law prohibiting the sale of intoxicating liquors, by preventing evasions under the color of sales of nonintoxicants; but it has not done so, and until such a law is enacted no tax can be collected.

It is true that the procuring of a United States revenue license is made *prima facie* evidence that the complainant was engaged in the retail liquor business; but such license is only *prima facie* evidence of the fact, and the tax being imposed only upon dealers in intoxicating liquors, and it being conceded that the beverages sold were nonintoxicating, the *prima facie* case is fully met and overcome.

We conclude that the statutes of this State restricting, prohibiting, and taxing the sale of liquors concern only intoxicating liquors.

We do not hold that the sale of any particular class or kind of beverage, or one containing any stated per cent. of alcohol, can be sold without payment of the privilege tax in question. What we do hold is that the beverage sold, to make the dealer liable for the tax, must be one that is intoxicating. Whether it is or is not intoxicating is a question of fact, to be determined upon the proof in each and every case in which it arises, just as if the sale was one of bitters, which does not make the dealer liable unless the bitters are intoxicating.

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We have been referred to decisions of courts of other States, construing revenue statutes of those States, which hold as contended by the defendant; but we cannot follow them. This case depends exclusively upon the construction of a statute of Tennessee, and we must interpret it according to its spirit and intent and the legislative will therein expressed.

The decree of the chancellor in favor of complainant must be affirmed.

State, ex rel., v. Endsley.

STATE, *ex rel.* JOHN ESTILL, v. W. M. ENDSLEY, Sheriff.

(Nashville. December Term, 1909.)

1. **ARREST.** Sheriff, without a warrant, has no authority to rearrest a prisoner improperly released by him.

Where the sheriff wrongfully and unlawfully discharged a prisoner before the expiration of his term of imprisonment imposed as punishment upon his conviction of the commission of an offense, by releasing him to another upon his payment of the fine imposed and the costs, upon the agreement of the prisoner to remain with his liberator and work for him until he should be repaid, the sheriff acted improperly and without authority in rearresting the prisoner without a warrant. (*Post*, pp. 649, 650.)

Case cited and approved: *McCaslin v. McCord*, 116 Tenn., 690.

2. **HABEAS CORPUS.** Prisoner unlawfully discharged and improperly rearrested without warrant is properly in custody under original commitment, and is not entitled to be released.

A prisoner so improperly discharged before the expiration of his term of imprisonment, and released to another upon his payment of the fine and costs, and wrongfully rearrested by the sheriff without a warrant, is not entitled to be released upon a writ of *habeas corpus*; for, upon regaining the custody of the prisoner, it was the duty of the sheriff to hold him under the original commitment until the satisfaction of its demands, upon the principle that where one is properly in custody, the unlawfulness of the manner by which the custody was obtained is immaterial. (*Post*, p. 650.)

Cases cited and approved: *Cook v. Hart*, 146 U. S., 183-195; *Re Johnson*, 167 U. S., 120-122.

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3. IMPRISONMENT AND FINE. Sentence of imprisonment must be served before prisoner can be bailed out to work out fine and costs.

A prisoner must first serve out the time for which he is sentenced, and then work out his fine and costs. After the time of imprisonment has been served, the prisoner may be, with his consent, bailed out to any one who will secure his fine and costs. Such bail cannot be given, however, until the term of imprisonment imposed as part of the punishment has been served. (*Post*, pp. 650, 651.)

Code cited and construed: Secs. 7417, 7424 (S.)

FROM DAVIDSON.

Appeal from the Criminal Court of Davidson County.—W. M. HART, Judge.

SMITHSON & ARMSTRONG, for relator Estill.

ASSISTANT ATTORNEY-GENERAL FAW, for Endsley.

MR. JUSTICE NEIL delivered the opinion of the Court.

This was a *habeas corpus* proceeding, instituted before Hon. W. M. Hart, judge of the criminal court of Davidson county. After hearing the case he declined to release the prisoner, and remanded him to the custody of the sheriff. The prisoner thereupon prayed an appeal to this court, and has here assigned errors.

It appears that on March 19, 1908, the relator was tried in the circuit court of Marshall county for selling

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intoxicating liquors without license, and was convicted and sentenced to undergo confinement for the period of six months in the county jail as a workhouse of the county, and also to pay the sum of fifty dollars fine and all costs of the cause. It was further adjudged that, in default of his paying the fine and costs, he should be confined in the said county jail until such further time after the expiration of the six months' sentence as would be necessary to pay the fine and costs according to law. The imprisonment began on the 24th of March, 1908. He was kept in jail until the 14th day of May, 1908. On that day the sheriff, by an arrangement made with the county court and one Wheeler, released the prisoner to Wheeler, who paid his fine and costs; the prisoner consenting to remain with Wheeler and work until he should be repaid. Subsequently the sheriff, having reached the conclusion that he had acted wrongfully and unlawfully in releasing the prisoner before his six months' term of imprisonment had expired, rearrested him and put him in jail, there to remain until his six months' time should expire. This rearrest was made without a warrant. Upon this being done, the petition for *habeas corpus* was sued out.

The first question is whether the sheriff acted properly in rearresting the prisoner without a warrant. We think he should have had a warrant. We find no authority for the sheriff's arresting a prisoner for a crime not committed in his presence, or in fresh pursuit, where there is sufficient time to get a warrant, even after he

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has escaped from jail. The subject is discussed in the case of *McCaslin v. McCord*, 116 Tenn., 690, 94 S. W., 79.

The second question is: Should the prisoner, for the reason stated, be now released? We think not. The sheriff had no right to release the prisoner in the first instance, and, having again obtained the custody of him, he would hold him under the original commitment. He may have been guilty of a technical wrong in rearresting the prisoner without a warrant, and may be liable for at least nominal damages therefor; but this does not change the principle that, having regained the custody of his prisoner, it was his duty to hold him under the former commitment until satisfaction of its demands. The principle is substantially the same as that which underlies the cases holding that although a prisoner has been unlawfully seized in a foreign State, and brought into a State where an indictment is pending against him, from which he has fled, he may still be held under process of the latter State, and tried on the charge, and that he will not be released in *habeas corpus* proceedings because of the original wrongful arrest or seizure. *Cook v. Hart*, 146 U. S., 183-195, 13 Sup. Ct., 40, 36 L. Ed., 934, and cases cited; *Re Johnson*, 167 U. S., 120-122, 17 Sup. Ct., 735, 42 L. Ed., 103, and cases cited.

There are two sections of Shannon's Code which show what the duty of the sheriff was while he yet had the prisoner in custody. They are sections 7417 and 7424. According to section 7417 the prisoner must first serve

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out the time for which he is sentenced, and then work out his fine and costs. According to section 7424, after the time of imprisonment has been served, the prisoner may be, with his consent, bailed out to any one who will secure his fine and costs. Such bail cannot be given, however, until the original term has been served. It had not been served in this case, and the release on bond was premature.

It results from what has been said above that there is no error in the judgment of the trial judge, and it must be affirmed.

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PELICAN ASSURANCE COMPANY *v.* AMERICAN FEED &
GROCERY COMPANY *et al.*

(*Nashville.* December Term, 1909.)

1. **ARREST OF JUDGMENT.** Motion for new trial is waived by prior motion in arrest of judgment.

The making of a motion in arrest of judgment prior to the motion for a new trial operates as a waiver of the motion for a new trial.

Case cited and approved: *Hall v. State*, 110 Tenn., 366.

2. **SAME.** Same. Minute entry of motion "in arrest of judgment and for a new trial" construed as showing motion in arrest first made and disposed of first.

Whether the minute entry that the defendant moved "the court in arrest of judgment and for a new trial" be considered as a single motion embracing two distinct, if not incongruous, matters of procedure, or be construed as the equivalent of a recital of the two motions, yet the necessary inference would be that the motion in arrest of the judgment was first made, and was disposed of first.

Case cited and approved: *Hall v. State*, 110 Tenn., 366.

3. **NEW TRIAL.** Bill of exceptions to preserve matters extrinsic to the technical record for review of action on motion for new trial.

The errors of the trial judge in his rulings on the evidence, in overruling a motion for peremptory instructions, and in giving and refusing instructions, occurring in the trial of the cause, constitute grounds of a motion for a new trial to be made in the trial court, and such errors must be preserved and made a part

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of the record by a bill of exceptions to obtain a review of the action of the trial judge in refusing the motion, because such errors rest upon matters extrinsic to the technical record.

Case cited and approved: Railroad v. Johnson, 114 Tenn., 633.

4. ARREST OF JUDGMENT. Motion in arrest lies alone for what defects.

A motion in arrest of judgment lies alone for some error which vitiates the proceeding, or is of so serious a character that judgment should not be rendered; and it can only be maintained for a defect upon the face of the record, and the evidence is no part of the record for this purpose.

Cases cited and approved: Bond v. Dustin, 112 U. S., 604; Van Stone v. Stillwell, 142 U. S., 128.

5. SAME. Same. Errors to be considered on motion for new trial cannot be reviewed in supreme court because motion in arrest of judgment was overruled.

Errors that are properly raised for consideration upon a motion for a new trial cannot be made the subject of investigation in the supreme court, by reason of the fact that a motion in arrest of judgment was overruled; for such practice and procedure would operate to abolish all distinction between a motion for a new trial and a motion in arrest of judgment.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County.—J. A. CARTWRIGHT, Judge.

STOKES & STOKES, for plaintiff in error.

T. G. KITTRELL and F. M. BASS, for defendants in error.

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MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The question here involved is the same that was considered and disposed of in *Hall v. State*, 110 Tenn., 366, 75 S. W., 716. In that case, as in this, the minute entry was that the defendant moved "the court in arrest of judgment and for a new trial;" and it was there held that, whether the motion was single, "embracing two distinct, if not incongruous, matters of procedure," or the entry was construed as the "equivalent of a recital of the two motions," yet the necessary inference would be "that the motion in arrest was first made, and . . . was disposed of first." In this condition of the record, the court applied the rule that the making of motion in arrest prior to the motion for a new trial was a waiver of the latter motion, and the legal effect of this waiver was that the court on appeal was "confined to error assigned on the face of the record."

In the case at bar errors are assigned upon the action of the trial judge in admitting over objection incompetent testimony, in overruling a motion for peremptory instruction, in giving certain instructions to the jury, and failing to grant requests that were submitted. It will be observed that these errors, if committed, occurred in the trial of the cause, and would have constituted grounds of a motion for a new trial, made in the court below, to the end that a retrial might be obtained, or, failing in this, then to preserve the same in the record, so that the ruling of the trial judge in de-

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clining the motion might be preserved to the plaintiff in error. *Railroad v. Johnson*, 114 Tenn., 633, 88 S. W., 169. Resting upon matters extrinsic to the technical record, they could only be preserved for review in this court by a properly filed bill of exceptions. If, as is contended by counsel for plaintiff in error, they can here be made the subject of investigation, by reason of the motion in arrest having been overruled, then we can see no distinction between that and a motion for new trial; for the very errors that are now made the subject of complaint are those which would have been properly raised on this latter motion. It is apparent that, to secure a reversal on account of these errors, it would be necessary to look beyond the "face of the record" into the evidence introduced. This cannot be done. It is well settled by the authorities that a motion in arrest of judgment lies alone for some error which vitiates the proceeding, or is of so serious a character that judgment should not be rendered. It "can only be maintained for a defect upon the face of the record, and the evidence is no part of the record for this purpose." *Bond v. Dustin*, 112 U. S., 604, 5 Sup. Ct., 296, 28 L. Ed., 835; *Van Stone v. Stillwell E. T. C. Co.*, 142 U. S., 128, 12 Sup. Ct., 181, 35 L. Ed., 961; 23 Cyc., 825.

Applying this rule of correct procedure to the present case, it follows that the judgment must be affirmed.

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MARY F. WRIGHT *et al.* v. JAMES HURST *et al.*

(Nashville. December Term, 1909).

1. ADVERSE POSSESSION. Under a junior grant on an interlap for seven years perfects title.

There is no doubt that, from the case of Napier v. Simpson, 1 Tenn., 453, down to Byrd v. Phillips, 120 Tenn., 14, an adverse holding, under a junior grant upon an interlap, for the term of seven years, gave the occupant a fee under the first section of Acts 1819, ch. 28, and it was not the purpose of the court, in the Bleidorn Case (89 Tenn., 166, 204), to modify this rule. (*Post*, pp. 662, 663.)

Acts cited and construed: Acts 1819, ch. 28, sec. 1.

Cases cited and approved: Napier v. Simpson, 1 Tenn., 453; Byrd v. Phillips, 120 Tenn., 14; and approving intermediate cases.

Case cited and distinguished: Bleidorn v. Pilot Mountain Coal & Mining Co., 89 Tenn., 166, 204.

2. SAME. On land excluded by the grant from its operation is not under color of title, when.

Where the State's grant includes within its boundaries, but excludes from its operation, all older and superior claims, it is not operative as color of title to the land so included and excluded, and sufficiently identified and located within the grant, and shown to be covered by older and superior title, and possession of part or all of such included and excluded land is not a possession under color of title. (*Post*, pp. 664, 665.)

Acts cited and construed: Acts 1819, ch. 28, sec. 1.

Case cited and distinguished: Bleidorn v. Pilot Mountain Coal & Mining Co., 89 Tenn., 166, 204.

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3. **SAME. Same. Grant** "platting out 600 acres prior claims" is not color of title to such excluded land shown to be held by superior title.

Where the State's grant undertakes, by its terms, to vest in the grantee all the land embraced in its descriptive clause, "platting out 600 acres prior claims," a possession affirmatively or otherwise shown to be on the 600 acres of excluded land held by superior title, identified and located, is not a possession under color of title by virtue of such grant. (*Post*, pp. 661, 665, 666.)

Acts cited and construed: Acts 1819, ch. 28, sec. 1.

Case cited and distinguished: *Bleidorn v. Pilot Mountain Coal & Mining Co.*, 89 Tenn., 166, 204.

4. **SAME. Same. Same. Grant** for about 2,800 acres covered entirely by superior titles, "platting out 600 acres prior claims" is color of title to all, excepting the 600 acres, and to that also unless identified and located.

Where the State's grant embraces about 2,800 acres of land covered entirely by older and superior grants, and undertakes, by its terms, to vest in the grantee all the land embraced in its descriptive clause, "platting out 600 acres prior claims," and it is not shown that the adverse possession under the grant is on the 600 acres so excluded, the words of exclusion cannot have the legal effect of destroying the grant a color of title, because the land is covered entirely by older and superior grants; and as to so much of the land so granted as lies outside of the 600 acres, identified and located, the grant is color of title, and if the 600 acres is not identified and located within the grant, the grant is color of title to that also. (*Post*, pp. 661, 665, 666, 669.)

Acts cited and construed: Acts 1819, ch. 28, sec. 1.

Case cited and distinguished: *Bleidorn v. Pilot Mountain Coal & Mining Co.*, 89 Tenn., 166, 204.

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5. **BOUNDARIES.** Call for course, or distance between two points, means a straight line, unless there is a clear intimation to the contrary.

Where the State's grant calls for a course, or distance between two points, it will be presumed that the State and the enterer and grantee intended a straight line, unless there is a clear intimation to the contrary. (*Post*, pp. 667, 668.)

Case cited, approved, and distinguished: *Burns v. Greaves, Cooke*, 75.

6. **SAME.** Same. Call with meanders of a stream, for a certain distance, "when reduced to a straight line," means that distance on a straight line.

A call in a grant, from a given point on a creek, "east with the various meanders of said creek, in all 800 poles, when reduced to a straight line, to a stake on said creek," the distance this line lay along the creek, on a straight line, was 800 poles. This locative call was the south boundary line of the land granted; and whatever ambiguity there might be in this call, if any, is removed by the fact the north boundary line of the grant, corresponding in length with it, is a straight line 800 poles long. (*Post*, pp. 661, 666-668.)

Case cited, approved, and distinguished: *Burns v. Greaves, Cooke*, 75.

7. **LAND LAWS.** State's grant for certain land, "platting out 600 acres prior claims," and determination of what lands are and what are not embraced in the 600 acres.

Where the State's grant undertakes, by its terms, to vest in the grantees, all the land (about 2,800 acres altogether) embraced in its descriptive clause, "platting out 600 acres prior claims," and it appears that the State had issued three prior grants, which, interlapping, covered the said entire tract of about 2,800 acres, the court cannot determine that any of said prior grants or which of them legally embrace the 600 acres to be platted out,

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or any particular part thereof; but where it appears that a part of a prior grant for 100 acres, issued before the said three grants, lies within the limits of the said later grant for about 2,800 acres, the court determines and adjudges that this is one of the tracts which made up the 600 acres of prior claims to be platted out. (*Post*, pp. 661, 665, 666, 669.)

8. **REMANDMENT.** To ascertain what part of prior grant lies within a later grant "platting out . . . prior claims," when. Where the State's grant is for certain land, "platting out 600 acres prior claims," and it not being clear how much of a certain 100 acre tract granted by a prior grant and constituting one of the tracts making up the 600 acres of prior claims to be platted out, lies within the said later grant, the case may be remanded to ascertain the facts, and for a decree founded thereon. (*Post*, pp. 661, 669).

9. **LAND LAWS.** Grant issued upon a special entry relates to the date of the entry.

A grant of the State issued upon a special entry relates to the date of the entry, and prevails over a prior grant issued after the date of such entry. (*Post*, pp. 669, 670.)

10. **ADVERSE POSSESSION.** Under younger grant on its interlap with an elder grant perfects title under younger grant, when.

The grantee's adverse possession under a younger grant on its interlap with an elder grant, for seven years, is effectual to create a fee in the possessor, which will descend to his heirs. (*Post*, pp. 661, 662, 670.)

11. **SAME.** Under younger grant, but not within interlap with older grant, does not toll or affect the title of the older grant.

The grantee's adverse possession, for seven years, under a younger grant, upon some part of the land, but not within the interlap with an older grant, does not perfect the title of the possessor so as to entitle him or his heirs to recover the land embraced

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in the older grant and lying within the younger grant. (*Post*, pp. 662, 670.)

Case cited and approved: *Elliott v. Coal & Coke Co.* 109 Tenn., 745.

FROM FENTRESS.

Appeal from the Chancery Court of Fentress County.
—D. L. LANSDEN, Chancellor.

SMITH & SMITH and CONATSER & CASE, for complainants.

McNUTT & WHEELER, for defendants.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The complainants, alleging that, with the defendant James L. Williams, they are heirs of John Williams, deceased, file the present bill to remove clouds upon the title to a tract of land described therein, to eject the defendants from the possession, and also for partition of the same. They deraign title to a grant to their ancestor, John Williams, issued by the State on the 25th day of August, 1849, which is in these words: "Commencing at a black oak tree about 70 yards north of the road leading from Jamestown to R. Rains, and

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about 300 yards north of said creek; running south 80 degrees east, 82 poles, to White Oak creek, and east with the various meanders of said creek, in all 800 poles, when reduced to a straight line, to a stake on said creek; thence north, 520 poles, to a stake; thence west, 800 poles, to a small white oak, about 10 poles east of a branch of Bee creek; thence south, crossing said branch at 18 poles, in all 520 poles, to the beginning, platting out 600 acres prior claims."

Various defenses were interposed by the several defendants. Among them were the following: First, that prior in date to the Williams grant, the State had issued three different grants, to wit, Nos. 6,420, 4,719, and 6,398, which, interlapping, covered the entire tract embraced in that to Williams, and, this being so, as a matter of law his grant was not color of title under the first section of the act of 1819 (Acts 1819, c. 28); second, that, upon a proper survey of his grant, Williams' possession was outside its limits; third, that Mary F. Wright, one of the complainants, had conveyed a part of the tract now claimed by her; and, fourth, adverse holding on grant 4,719.

The case was tried by the chancellor, sitting as a jury, and he found as facts that complainants' grant was located with reasonable certainty by a survey of one P. H. Smith, which is made a part of the record, and that John Williams, the grantee, was in possession of a part of the tract within the boundaries of his grant for more than seven years after the issuance of the grant

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to him claiming under the same. Upon this finding he held as a matter of law that Williams' title was perfected into a fee, which descended to his heirs, and that complainants, as such, could maintain their bill, save in certain respects.

The chancellor, while finding the facts with the contention of defendants as to the covering of the Williams grant by the prior and interlapping grants referred to, yet held that the adverse possession of the grantee Williams for seven years on the interlap of his grant with grant 6,420 was under color of title. He found as a matter of fact and law that the second of the above defenses was not well taken, that the third was maintained, and the fourth he declined to rule on. All parties have appealed.

For the defendants it is insisted that the case of *Bleidorn v. Pilot Mountain Coal & Mining Co.*, 89 Tenn., 166, 204, 15 S. W., 737, has settled the rule in this State that a junior grant, with words of exclusion such as are found in that of Williams, is not color of title, converting into a fee an adverse holding of seven years. There is no doubt that from *Napier v. Simpson*, 1 Tenn., 453, down to *Byrd v. Phillips*, 120 Tenn., 14, 111 S. W., 1109, adverse holding under a junior grant upon an interlap for the term of seven years gave the occupant a fee under the first section of the act of 1819, and it was not the purpose of the court, in the Bleidorn Case, to modify this rule. All the court did was to hold that under the facts of that case this rule did not apply. We

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think an examination of the opinion of the court removes all doubt in the matter.

The title set up by the Bleidorn heirs originated in three entries, numbered, respectively, 1,942, 1,949, and 1,950. The contest over entry 1,949 was chiefly with the Pilot Mountain Coal & Mining Company, which relied upon certain entries and grants as superior outstanding titles. Among these were entry 1,727, grant 22,339, to Julian F. Scott, for 5,000 acres, and entry 1,925, grant 22,329, to Hannah M. Byrd, for 5,000 acres. One of the questions was: Had the statute of limitations barred a recovery of the land covered by entry 1,727? This was answered in the original opinion in the affirmative; the court finding that what is called in the record "Scarborough possession No. 2" was begun as early as 1846 or 1847 under Julian F. Scott, the grantee under entry 1,727, continuing adversely for seven years, and this operated to bar complainants' claim. Complainants filed a petition for rehearing, calling attention to the fact that the possession was within entry 1,925, known as the "Hannah Byrd entry," and this, being a special entry, was excluded from the grant under which they claimed, and this possession was inoperative as an adverse possession within the interlap of 1,727 and 1,949. As to this the court said: "This question was not decided, and attention was not called to it, either in the oral or printed arguments. . . . The grant to Eastland upon entry 1,949 describes the granted land as a certain tract containing 2,500 acres, 'begin-

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ning at a stake and pointers, the northeast corner of entry 1,948' (then follows full description), including in the above calls of prior and legal claims 3,088 acres of land." Continuing, it was said: "A calculation will show that the calls include about 5,590 acres, of which only 2,500 acres were granted. . . . The effect of such a grant is to confer upon the grantee a legal title to all the land within the calls of the grant not shown to have been held at the time by a superior title. When, however, it is shown that within the calls there was a superior legal claim by older special entry, or by an older grant, then the effect of such proof is to exclude such older superior claim from the operation of the grant, and the grant, as to such excluded older claim, is not operative as color of title to the land so included and excluded."

The court further said: "The defendant the Pilot Mountain Coal & Mining Company introduced the entry and grant to Hannah Byrd, and relied upon it as an outstanding paramount title, operating to defeat complainants in so far as it conflicted with complainants' grant. We decided that it was a subsisting paramount title, and as such effective to defeat complainants to the extent of its interlap with 1,949. Another necessary effect of this proof is to exclude the lands so held from the operation of complainants' grant; that is, complainants' grant must be so run as to exclude the older title. The Scarborough possession No. 2 was apparently within the interlap of the three grants; but,

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while it was within the entry 1,727, and within the interlap of 1,925 with that entry, yet, being upon an older claim excluded from the grant on [entry] 1,949, it was not in fact within the interlap of 1,727 and 1,949, and was not, therefore, a possession adverse to complainants."

In other words, the court, finding the Hannah Byrd entry to be special and older than entry 1,949, held it within the words of exclusion, and as much outside the terms of the grant as if named, and therefore a possession on it was not adverse to complainants, and the grant based on this entry was not color of title to the defendant. That this was the full extent of this holding, we think, is made clear later on, when discussing the rule of evidence laid down in *Bowman v. Bowman*, 3 Head, 47, and *Fowler v. Nixon*, 7 Heisk., 719, that it devolved on the defendant who disputes the title of a plaintiff, claiming under a grant excluding older titles without describing them, to show the existence of such older titles, and, stating the reason of the rule, then added: "Here the defendant made such proof, and its legal effect was to defeat complainants by showing a superior outstanding title. But another of the legal effects of such evidence was to entirely exclude this paramount title from the operation of complainants' grant, by force of the excluding words of the grant."

Now, referring to the words of the grant in this case, it is found that the State by its terms undertakes to vest in the grantee all the land embraced in its de-

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scriptive clause, "platting out 600 acres prior claims." If it was affirmatively or otherwise shown that the Williams possession was within the lands thus excluded, unquestionably it would not be adverse to the claimants under the older grant of that number of acres, nor would the Williams grant be color of title to such possession. But this is not shown, and we are unable to see anything in the record which warrants the application of the rule in the Bleidorn Case. Certainly that case cannot be held as authority for the contention that these words of exclusion have the legal effect of destroying as color of title a grant of about 2,800 acres, because this same land is covered entirely by older grants. As to so much of this land so granted as is outside 600 acres, the old and well-established rule already referred to applies.

The chancellor found, as has been stated, that complainants' grant No. 9,946 was located with reasonable certainty by the survey of P. H. Smith; that the call for the south end of the west boundary line of the grant, or, in the words of the grant, "commencing at a black oak tree about seventy yards north of the road leading from Jamestown to R. Rains, and about three hundred yards north of said [White Oak] creek," as fixed in the survey, was fully warranted by the local conditions existing at that point. Following the first call, this surveyor ran 800 poles on a direct line to a stake. As to this the chancellor, in his opinion found in the record, said: "Having located the west boundary line

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of the grant, . . . I think the proper construction of the call on the south boundary line, running from end of the line, 83 poles, southeast to the creek, and with the meanders of White Oak creek in all 800 poles when reduced to a straight line is that the meanders of the creek are to be the south boundary line of the grant, and that the south line of the grant, if straight, would be 800 poles long, corresponding to the north boundary line." This construction of the grant is challenged as being unsound. It is insisted that the survey should follow these meanders, and when, in so doing, a point has been reached 800 poles from the beginning, a stake should be set as the terminal point of the south boundary, and thence north 520 poles to a stake. Running thus, it is insisted the possession of Williams will be outside and east of his boundaries.

There is no doubt, in a case like that of *Burns v. Greaves' Lessee*, Cooke, 75, where the entry and grant were of a tract of land "lying on the north side of Duck river, on the first creek above Spring creek, beginning on said river three-quarters of a mile below the mouth of said creek," without anything else to direct, a subsequent enterer would naturally assume that the beginning point was to be found by following the meanders of the river. This was the view entertained by the court in that case, and is the view expressed in a number of cases cited by counsel. But we think there is as little doubt that when a course is called for, or a distance between two points, unless there is a clear in-

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timation to the contrary, it is to be inferred that the enterer intended a straight line. This was the opinion expressed by White, J., in the Burns' Case, *supra*, in the following language: "I entirely agree with the circuit court in the opinion that, when the distance between two given points is to be ascertained, it must be by running a direct line, unless an intimation is given that a crooked line is intended."

We think in this case the intimations clearly indicate that a direct line was intended by both the State and the grantee.

White Oak creek is referred to as a locative call, showing that it was the south boundary of the land granted; but the distance it lay along that creek on a straight line was 800 poles. Whatever ambiguity there might be in this call is removed by the fact that the north line of the grant corresponds in length with it. From the stake, which is the terminal point of the east line as it ran north, this north boundary extends west 800 poles to a white oak about 10 poles east of Bee (evidently Big) creek.

We agree, therefore, with the chancellor that Williams' adverse holding was within the limits of his grant.

The finding by the chancellor, as a fact, that J. M. Wright was in possession of the Mosey Wright, or, as it was sometimes called, the Owens, place, for more than seven years after the Williams possession went down, we think is warranted by the evidence. We, how-

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ever, do not think it clear that this possession was under the Clemmons deed to him, dated in 1858. On the 16th of July, 1859, he took a deed from William Pile for 200 acres. After describing this tract, the recital is that it is "the land whereon Mosey Wright now lives, and formerly owned by John A. West." This is, as admitted, the tract granted to John A. West on the 8th of April, 1828, antedating entry No. 496 about two years, and grant 6,420 about ten years.

In view of all the facts, we think the adverse possession of Wright was limited to the boundaries of the West grant, and that the chancellor was, as a matter of law, right in so holding.

The record shows that a part of the 100 acres covered by entry 192, dated June 10, 1829, on which issued grant 2,468, dated June 10, 1829, lies within the limits of grant 9,946. This, we are satisfied, is one of the tracts which made up the 600 acres of prior claims to be platted out. Whatever part of this tract that lies within the Williams grant complainants have no claim to and have no right to recover. As it is not clear how much of this tract does lie within grant 9,946, this case may be remanded to ascertain the facts, and for a decree founded thereon. The remand will also include the order of reference provided for in the chancellor's decree.

We are entirely satisfied with regard to the chancellor's holding that entry 496, on which grant 6,420 issued, was a special entry, and, this being so, the grant

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related to its date, and thus was prior in right to grant 4,719. We are further satisfied that the possession of Williams, being on the interlap of 6,420 and 9,946, was effectual in creating a fee in him, which descended to his heirs.

We concur with the chancellor in his opinion that complainants were not entitled to a recovery of any of the land embraced in grant 4,719, as they had no possession within that grant. *Elliott v. Cumberland Coal & Coke Co.*, 109 Tenn., 745, 71 S. W., 749.

We also concur in his holding limiting the recovery of Mary F. Wright in this case by the terms of her deed to Blanchard and others, and also that complainants under their bill are not entitled to a decree, save for their respective interests in the property sued for.

The chancellor's decree is affirmed, except in the respect indicated herein. The costs of appeal will be paid as follows: One-third by complainants, one-third by Cumberland Coal & Coke Company and the Mississippi Valley Insurance Company, and the remaining one-third will be paid by the other defendants named in the bill.

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J. F. SINGER *et al.* v. W. H. SINGER *et al.*

(Nashville. December Term, 1909.)

SUPREME COURT JURISDICTION. Where each of several claimants sue individually in chancery for separate sums less than one thousand dollars, but the aggregate of which exceeds that amount, the court of civil appeals, and not the supreme court, has appellate jurisdiction.

Where the attorneys for the contestant in a will contest in the circuit court, after procuring the will to be set aside, filed their several petitions in a suit pending in the chancery court involving the administration of the estate of the then intestate whose will was set aside, for the purpose of subjecting the interest of said contestant in the estate of said intestate to the payment of their fees, the amount of which claimed by each attorney individually was less than one thousand dollars, but the aggregate amount of the fees claimed by all exceeded that sum, whereupon their several petitions, for convenience and to save expense, were consolidated in the chancery court and heard together, and a decree was pronounced in favor of each attorney, respectively, for a sum less than that claimed by him, from which decree each of said attorneys severally prayed and prosecuted an appeal to the supreme court, the appellate jurisdiction of the supreme court should be determined by the individual controversies, and by the amount each claims the right to recover, and under the statute (Acts 1907, ch. 82) creating the court of civil appeals and (by section 7 thereof) conferring upon that court appellate jurisdiction of all chancery cases involving money recoveries, except where the amount involved in controversy, exclusive of costs, exceeds one thousand dollars, the court of civil appeals, and not the supreme court, has jurisdiction of the said appeals.

Acts cited and construed: Acts 1907, ch. 82, sec. 7.

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Cases cited and approved: *Seaver v. Bigelow*, 5 Wall., 208; *Paving Co. v. Mulford*, 100 U. S., 147; *Russell v. Stansell*, 105 U. S., 303; *Railroad, In re*, 106 U. S., 5 (and citations); *Loan & Trust Co. v. Waterman*, 106 U. S., 265; *Hawley v. United States, ex rel.*, 108 U. S., 556; *Tupper v. Wise*, 110 U. S., 398; *Bank v. Stout*, 113 U. S., 684; *Henderson v. Wadsworth*, 115 U. S., 264; *Tupino v. Compania General de Tabacos*, 214 U. S., 268; *Farwell v. Becker*, 129 Ill., 261; *Spangler v. Green*, 21 Colo., 505.

Cases cited and distinguished: *Market Co. v. Hoffman*, 161 U. S., 112; *Davies v. Corbin*, 112 U. S., 36; *Railroad v. Parker*, 143 U. S., 42; *Overby v. Gordon*, 177 U. S., 214; *McDaniel v. Traylor*, 196 U. S., 415; *Morgan v. Adams*, 211 U. S., 627.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JOHN ALLISON, Chancellor.

W. D. COVINGTON, W. G. BRIEN, W. S. NOBLE, FRANK SLEMONS, and R. L. KENNEDY, for petitioners and appellants.

NOAH W. COOPER, for appellees.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

This cause was before the court on a former day of the term, and was dismissed for want of jurisdiction. We have been presented with a very earnest petition to rehear the case.

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The action of the court in dismissing the appeal was based on the ground that the jurisdictional amount involved was less than \$1,000, and that the appeal should have been prosecuted to the court of civil appeals.

Section 7 of the act creating the court of civil appeals (Acts 1907, c. 82) provides:

"That the jurisdiction of said court of civil appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars."

The appellants were petitioners in the suit of *J. F. Singer et al. v. W. H. Singer et al.*, pending in the chancery court of Davidson county, and involving the administration of the estate of Mrs. Christine Singer, deceased.

Mrs. Singer died in Davidson county in 1905, leaving a will, in which the complainant, J. F. Singer, was the sole legatee and devisee.

The other children, W. H. Singer and a daughter, Mrs. Harding, contested the will of their mother, Mrs. Christine Singer, in a suit commenced in the circuit court of Davidson county. W. H. Singer employed several lawyers in the prosecution of that suit, with whom he had specific contracts. He contracted in writing to pay Mr. Jno. L. Nolen twenty per cent of any recovery in the case, Mr. James S. Pilcher twenty-five per cent, and to Mr. W. H. Cooper he agreed to pay

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\$500, and he declared a lien on any amount he might recover in favor of said attorneys for their respective fees.

Such proceedings were had in the will contest, that the will was set aside. Petitions were then filed by the several attorneys in the suit pending in the chancery court for the administration of the estate of Mrs. Christine Singer, for the purpose of subjecting the interest of W. H. Singer in the estate of his mother to the payment of their fees. The interest of W. H. Singer in his mother's estate amounted to about \$4,000.

A reference was ordered to the master to take proof and report the amount due the several petitioners on account of fees.

The master, on proof offered, reported the following amounts as reasonable compensation for said counsel:

J. S. Pilcher	\$350.00
John L. Nolen	500.00
W. H. Cooper	150.00

Exceptions were filed by all parties to the report, which were overruled, and the report was confirmed by the chancellor, whereupon each party appealed to to this court, and has assigned errors.

It is insisted on behalf of the administrator of John L. Nolen that he is entitled to a recovery of at least \$800, being twenty per cent of the interest of W. H. Singer in his mother's estate. Mr. James S. Pilcher claims a fee of \$600, and Mr. W. H. Cooper a fee of \$500.

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It will be observed that the amount claimed by each party individually is less than \$1,000, but the aggregate amount of the fees claimed would exceed that amount.

The several petitions were consolidated in the court below and heard together, and a decree pronounced in favor of each attorney for the amount allowed by the clerk and master, and the receiver was directed to pay said amounts out of any funds in his hands belonging to the said W. H. Singer.

An appeal was prayed and prosecuted by each party severally from the decree of the chancellor to this court. It is earnestly insisted on behalf of appellants that this court has jurisdiction of the appeal for two reasons:

First. That the aggregate amount of petitioners' claims exceeds \$1,000; and

Second. Said fees are chargeable on a fund in the chancery court amounting to \$4,000.

In view of the earnest petition to rehear this case on the question of jurisdiction and the importance to the parties of having the matters in controversy settled as early as possible, we have not only examined the authorities cited in support of the petition to rehear on the question of jurisdiction, but likewise a large number of cases presenting analogous questions.

In *Seaver et al. v. Bigelow*, 5 Wall., 208, 18 L. Ed., 595, it appears that Seaver and others had filed a creditors' bill against the defendants, and a decree was entered dismissing the bill. On appeal to the supreme

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court the question arose as to whether or not the supreme court had jurisdiction on account of the fact that none of the several complainants had a claim equal to \$2,000, notwithstanding that the sum of the several claims was largely in excess of said sum of \$2,000. The court, speaking through Mr. Justice Nelson, said in part as follows:

"The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than \$2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each. . . .

"It is true the litigation involves a common fund, which exceeds the sum of \$2,000; but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

In *Ballard Paving Co. et al. v. Mulford et al.*, 100 U. S., 147, 25 L. Ed., 591, it appeared that a bill in equity

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was brought by the paving company against Mandle and many other persons, who claimed to be the purchasers "from Mandle of certain certificates of the auditor of the board of public works of the District of Columbia, which it was alleged were the property of the paving company."

Mr. Chief Justice Waite, delivering the opinion of the court, said:

"Mulford and Campbell, the appellees, were two of the defendants, but they were proceeded against as holders of separate and distinct certificates. Their liability as set forth in the bill was several only. There was no pretense of a joint obligation, and it is conceded that in no event could there be a recovery against either of them separately for more than \$2,500."

"We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into this suit, the proceeding is, in fact, against each of the several purchasers to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each as in the case of separate suits. The recovery, if any, must be against each defendant separately for the amount he may personally be found accountable. Such being the case, the value of the amount in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither codefendants nor cocomplainants can unite their separate and distinct interests for the purpose of mak-

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ing up the amount necessary to give us jurisdiction on an appeal. . . . In such cases the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction."

In *Russell v. Stansell*, 105 U. S., 303, 26 L. Ed., 989, it appeared that Stansell had obtained a decree against a certain levee board for \$71,634.67, and, being unable to collect his decree, instituted proceedings to obtain an assessment and collection of the charge which was imposed on the lands in the district for the payment of said judgment. This assessment was accordingly made, and the landowners thereafter asked an injunction against the collection of the several assessments that had been made, alleging various reasons why they should be held illegal. No single individual could in any event be made liable for an amount exceeding \$2,500. The injunction having been dissolved, this appeal was taken, and it is now moved to dismiss the same by reason of the fact that none of the parties would be charged with as much as \$5,000.

Chief Justice Waite, delivering the opinion of the court granting the motion, said:

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"While the appellants and those whom they have been chosen to represent are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body. Proceeding on the part of the appellee was to require each of the several landowners in the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally or his property was found to be accountable. . . . It is clear that under the rulings . . . , such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Although the amount due the appellee from the levee district exceeds \$5,000, his claim on the several owners of property is only for the sum assessed against them respectively."

In the *Matter of the Baltimore & Ohio Railroad Co.*, 106 U.S., 5, 1 Sup.Ct., 35, 27 L. Ed., 78, it appeared that there had been a collision between a steamer owned by the railroad company and a barge owned by one Maxon, which barge was loaded with grain owned by Moore & Co. Both the barge and the cargo were injured in the collision, and the owners of each united in a libel to

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recover damages. Judgments were entered for each of them in amounts which aggregated more than \$5,000, but neither of which was as much as \$5,000. The railroad company, as owner of the steamer, sought to appeal.

Chief Justice Waite, in delivering the opinion of the court, said:

"It is impossible to distinguish this case in principle from *Oliver v. Alexander*, 6 Pet., 143 [8 L. Ed., 349]; and *Stratton v. Jarvis*, 8 Pet., 4 [8 L. Ed., 546]; *Spear v. Place*, 11 How., 522 [13 L. Ed., 796], and *Rich v. Lambert*, 12 How., 347 [13 L. Ed., 1017], under which, for half a century, it has been held that when, in admiralty, distinct causes of action in favor of distinct parties growing out of the same transaction, are united in one suit, according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give the court jurisdiction on appeal [citing cases].

"The case of *Shields v. Thomas*, 17 How., 4 [15 L. Ed., 93]; *Market Co. v. Hoffman*, 101 U. S., 112 [25 L. Ed., 782], and *The Connemara*, 103 U. S., 754 [26 L. Ed., 322], relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how

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the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by Chief Justice Taney in *Shields v. Thomas*, and that case was held to be within the latter class. It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has long been established."

In *Farmers' Loan & Trust Co. v. Waterman*, 106 U. S., 265, 1 Sup. Ct., 131, 27 L. Ed., 115, there had been a foreclosure suit against a certain railroad company, and in a decree the master was ordered to report all claims against said railroad. There were many of these claims, but of them only fourteen were for sums in excess of \$5,000. Certain claims, being less than \$5,000, were allowed by the court, and, on an appeal being taken by the trustee to the supreme court of the United States, a motion to dismiss for lack of jurisdiction was made. Chief Justice Waite again delivered the opinion of the court granting the motion, and among other things said:

"Our jurisdiction, therefore, depends on the case as it stands between the purchasing committee and the several back-pay claimants. As we have shown at the present term in *Ex parte Railroad Co.*, if distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit, and

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distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give us jurisdiction; but if the controversy is about a matter in which several parties are interested collectively under a common title, and in the decree, after establishing the common right, a division is made among the claimants according to their respective interests, this separation of a decree into parts will not prevent an appeal.

"We are satisfied the present case comes under the first division of this rule. . . . A recovery by one claimant will not necessarily involve a recovery by another. While the rights of all depend on establishing a liability of the purchasers for the payment of debts of a particular kind, no one can recover unless he shows that there is owing to him individually a debt of that kind. There are, therefore, necessarily in the case as many separate and distinct controversies as there are claimants and interveners. The purchasers have the right to contest each claim separately. . . . The amount of the recovery by one is not affected in any manner by what is allowed to another. Clearly, therefore, distinct causes of action in favor of distinct parties have been joined in the same suit, and distinct decrees rendered in favor of the distinct parties."

In *Hawley v. United States, ex rel.*, 108 U. S., 556, 2 Sup. Ct., 846, 27 L. Ed., 820, certain owners of separate judgments against Lee county had joined in a *mandamus* against the tax assessor, requiring him to levy a tax sufficient to pay their several judgments, which writ was duly awarded, and the assessor appealed.

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Said Chief Justice Waite:

"We are met at the outset with a motion of the defendants in error to dismiss the writ in this case on the ground that the several judgments proceeded upon below cannot be united to give us jurisdiction and the amount due on any one of them does not exceed \$5,000. The rule is settled, as stated more than once, at the present term, that when distinct causes of action in favor of distinct parties are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments cannot be joined to give us jurisdiction. . . . In the present case distinct causes of action in favor of distinct parties were united, for convenience and to save expense, in one suit, and distinct orders were made in favor of each one of the several judgment creditors. . . . In the present case the amount due relators, Fairbanks and Thomas, respectively, does not exceed \$5,000. As to them, consequently, the writ must be dismissed."

In *Tupper v. Wise*, 110 U. S., 398, 4 Sup. Ct., 26, 28 L. Ed., 189, suit was brought by Wise against several persons to recover possession of certain lands. Tupper answered, denying that he was in possession of all the land described, but setting up claim to a small portion thereof. Another of the defendants made the same answer, but set up claim to another and different portion of the tract; each defendant claiming a separate and distinct interest in a separate and distinct part of the land. Judgment was rendered against each for that

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part of the land which each claimed. The value of neither of these portions was as much as \$5,000, but together they aggregated more than that sum. Chief Justice Waite said as follows:

"This motion is granted. The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction. . . . The stipulation as to the value of the property which is found in the record cannot alter the case, for it states that the aggregate value of the two quarter sections exceeds \$5,100, and the verdict fixes the value of each quarter at \$3,000."

In *Fourth Nat. Bank of St. Louis v. Stout*, 113 U. S., 684, 5 Sup. Ct., 695, 28 L. Ed., 1152, there was a suit in equity by certain judgment creditors of a mill company to recover from the bank their *pro rata* share of certain property of said company which was in the hands of the bank. The bank claimed said property by virtue of a superior right, and upon the hearing decrees were entered in favor of six of the creditors, the aggregate of whose claims was in excess of \$5,000, but no one of which equaled said amount. The bank appealed, and on motion to dismiss Chief Justice Waite said:

"The appellees have separate and distinct decrees in their favor, depending on separate and distinct claims. If none of the other creditors had intervened, and the decree had been rendered in favor of Stout, Mills, and Temple alone, upon their bill as filed, in which they

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sought to recover only their *pro rata* share of the assets of their debtor in the hands of the bank, it certainly could not be claimed that an appeal would lie if their recovery was for less than \$5,000. The suit was instituted, not for the whole property in the hands of the bank, but only for the complainants' *pro rata* share. After the suit was begun the intervening creditors were allowed to come in each for his separate share of the assets. On their intervention the case stood precisely as it would if each creditor had brought a separate suit for his separate share of the fund. The decree in favor of the several creditors has precisely the same effect, for the purpose of an appeal, that it would if rendered in such separate suits."

In *Henderson v. Wadsworth*, 115 U. S., 264, 6 Sup. Ct., 140, 29 L. Ed., 377, the subject is again investigated at some length by Mr. Justice Wood, wherein he refers to the cases heretofore cited, and differentiates the cases of *Shields v. Thomas*, 17 Hqw., 3, 15 L. Ed., 93; *Market v. Hoffman*, 101 U. S., 112, 25 L. Ed., 782; *The Connemara*, 103 U. S., 754, 26 L. Ed., 322; *The Mamie*, 105 U. S., 773, 26 L. Ed., 937, and *Davies v. Corbin*, 112 U. S., 36, 5 Sup. Ct., 4, 28 L. Ed., 627, some of which have been cited in the brief of appellants for the proposition that the two claims of Pilcher and Nolen may be added together for the purpose of conferring jurisdiction of this appeal upon this court. In addition to the cases above referred to, the opinion of Mr. Justice Brown, in the case of *New Orleans Pac. Railway Co. v.*

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Parker, 143 U. S., 42, 12 Sup. Ct., 364, 36 L. Ed., 66, contains an interesting review of some of the cases heretofore referred to, where it was again held that "if several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed \$5,000."

The cases of *Overby v. Gordon*, 177 U. S., 214, 20 Sup. Ct., 603, 44 L. Ed., 741, and *McDaniel v. Traylor*, 196 U. S., 415, 25 Sup. Ct., 369, 49 L. Ed., 533, furnish later illustrations of that class of cases where separate claims each under \$5,000, may be joined for the purpose of conferring jurisdiction upon the supreme court of the United States, on the ground that each of several said joined claimants derives his title from the same source; an adjudication as to one being necessarily an adjudication as to all.

The first of said last-named cases was a will contest, had in the District of Columbia, relative to certain personal property of the decedent of the value of about \$10,000, all of which was situated in the District of Columbia. The controversy having been decided against the contestants in said proceeding, they appealed to the supreme court of the United States, where a motion to dismiss was made upon the ground that no one of the appellants had an interest in said estate that was as much as \$5,000. Mr. Justice White, speaking for the court, said:

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"In the case at bar, the contestants below sought, not an allotment to them of their interest, if any, in the estate, but an adjudication that the alleged last will and testament possessed no validity, and that contention was advanced by virtue of a claim of common title in the interest of kin of the decedent to the *corpus*; such title, if any, being derived from the law of the alleged domicile of the deceased. In this aspect the amount of the estate was the matter in dispute. . . . There is, therefore, no merit in the objection to the exercise of jurisdiction."

A like conclusion was reached in *McDaniel v. Traylor*, *supra*, in a lengthy opinion delivered by Mr. Justice Harlan.

The case of *Morgan v. Adams*, 211 U. S., 627, 29 Sup. Ct., 213, 53 L. Ed., 362, was also a case in which it was held that, on appeal from a judgment, the validity of a certain will, the matter in dispute was the aggregate value of the alleged legacies in favor of the appellants.

The case of *Tupino v. Compania General de Tabacos*, 214 U. S., 268, 29 Sup. Ct., 610, 53 L. Ed., 992, is the latest case wherein this question is discussed by the supreme court of the United States. In that case suit was instituted for the recovery of certain lands by the defendant in error against some 84 persons. The defendants did not claim, nor was it alleged, that they were joint tenants of the entire premises; but the allegation was that each one of said defendants claimed to be the separate owner of a distinct piece of the land

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sued for. The aggregate value of all the pieces of land was in excess of the jurisdictional amount, to wit, \$25,000; but no single one of said parcels equaled that amount. Judgment was entered in favor of the plaintiff, and the several defendants appealed to the supreme court of the United States, where motions to dismiss were made upon the ground that the matter in dispute did not equal \$25,000. Among other things Mr. Justice Moody said as follows:

"It is very clear, although the plaintiff claimed under a single title all the land occupied separately by the various defendants, that the action itself was not against the defendants as joint disseisors, but was an action against each of them separately as the holder of a distinct parcel or parcels of land. There was no allegation, in either the complaint or the answer, of joint ownership or joint possession, or joint action of any kind. The proceeding in effect consisted of eighty-four separate and distinct actions against the eighty-four defendants. The complaint alleged, that each defendant was in possession of a separate and distinct parcel of land, described separately, however inadequately. The answer of each defendant, while denying *in toto* the title of the plaintiff, in other respects related solely to the tract of land alleged to be unlawfully held by that particular defendant. . . . But where the pleadings show that there was no allegation of joint ownership or joint possession, and that the controversy with each defendant related to a separate and distinct lot

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of land, and the judgment is rendered separately against the defendants, then the measure of jurisdiction on appeal or writ of error is not the value of the whole land, but the value of each part separately. *Tupper v. Wise*, 110 U. S., 398 [4 Sup. Ct., 26], 28 L. Ed., 189, where it was said: "The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction."

"We think that the case at bar falls within the rule of *Tupper v. Wise*. It appears in point of fact that the value of the whole land which the plaintiff sought to recover in separate parcels from the eighty-four defendants exceeds \$25,000. But it appears that the value of the land in controversy with any one of the defendants is far less than \$25,000."

In the case of *Farwell v. Becker*, 129 Ill., 261, 21 N. E., 792, 6 L. R. A., 400, 16 Am. St. Rep., 267, the facts were that Farwell Company, Becker, and Eisen & Co., were creditors of Olquist Bros., a firm which became insolvent and made certain stock transfers, which were claimed to be fraudulent, and against which certain attachment suits were brought. The goods so attached were sold, and realized enough to pay the claims of Farwell and Becker. Thereafter trespass suits were brought by the parties who purchased the goods from Olquist Bros., against the sheriffs who made the levies, and judgments were recovered, which judgments were

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paid by Farwell & Co. They thereupon brought this bill to compel Becker and Shirk to contribute *pro rata* to the amount they had paid out. Decrees were entered, requiring Becker to pay something in excess of \$5,000, and requiring Shirk to pay something over \$500. Appeals were duly taken. Says the court:

"We think it is plain that this court has no jurisdiction, so far as the defendant Shirk is concerned. Although two parties were made defendants to the bill, the action is against each defendant to enforce a separate and distinct liability. The claim relied upon was separate as to each defendant, and so was the recovery. Shirk was in no manner connected with Becker as to the claim against him, nor was Becker in any manner liable as respects the claim against Shirk. Where the amount against each defendant is separate and distinct as is the case here, the two amounts cannot be united so as to confer jurisdiction, but each must be treated as a separate suit; but if the amount involved as to either one is not large enough to confer jurisdiction the appeal must fail."

In *Spangler v. Green*, 21 Colo., 505, 42 Pac., 674, 52 Am. St. Rep., 259, the court said:

"The objection interposed by appellees to the jurisdiction of this court to entertain the appeal must first be disposed of before considering the assignments of error. Section 1, p. 118, Sess. Laws 1891, provides that no appeal to the supreme court shall lie to review the final judgment of any inferior court unless the judg-

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ment exceeds \$2,500, exclusive of costs. . . . To warrant the assumption of jurisdiction, the amount of the judgment in a case like the one at bar, must be determined by the amount of the judgment in favor of each lien claimant, and not the aggregate amount of the several judgments; and, as neither of the several judgments here amounts to \$2,500, jurisdiction on this ground does not attach."

The cases especially relied on by counsel for appellants are *Davies v. Corbin*, 112 U. S., 36, 5 Sup. Ct., 4, 28 L. Ed., 627, and *Washington Market Company v. James A. Hoffman*, 101 U. S., 112, 25 L. Ed., 782.

In *Davies v. Corbin*, supra, it was held that "in proceedings for a peremptory writ of *mandamus* to compel a tax collector to collect a tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest, the value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected, and where the whole amount of tax is more than \$5,000, the court has jurisdiction on writ of error."

In that case a motion was made to dismiss the writ of error on the ground that the value of the matter in dispute does not exceed \$5,000, inasmuch as no one of the relators will be entitled to receive of the tax collected so much as \$5,000, and no one single taxpayer will be required to pay that amount of tax.

The court said as follows: "They have a common interest in the tax, and it is perfectly immaterial to the

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tax collector how it is divided among them. He has no controversy with them on that point; and if there is any difficulty as to the proportions in which they are to share the proceeds of his collections, the dispute will be among themselves, and not with him. He cannot act upon separate instructions from the several creditors. His duty is to collect the tax for the benefit of all alike. A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax of ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent, therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them, after the collection is made, according to their several shares. . . . It is conceded that the amount of the tax is more than \$5,000."

The case of *Washington Market v. Hoffman*, supra, involved the same principle as that announced in the last case; but it is obvious that they are wholly inapplicable to a case like the present, where each petitioner is seeking to recover a separate judgment for his individual fee, and where the amount claimed by each is less than \$1,000. This is not the case where judgment creditors are asserting a common right to the whole of a specific fund, and where the jurisdiction of the court

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is determined by the amount of the fund in controversy. The jurisdiction of this court must be determined in the present case by the individual controversies, and by the amount each claims the right to recover.

After a very careful examination of all the authorities accessible, we are of opinion this court is without jurisdiction, and our former decree, remanding this cause to the court of civil appeals, must be reaffirmed.

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JOHN W. PHY v. J. M. HATFIELD *et ux.*

(*Nashville*. December Term, 1909.)

1. **ABANDONMENT.** Of title to land must be shown by clear and unmistakable affirmative act of repudiation.

The abandonment of title to land by the owner must be shown by some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. (*Post*, p. 696.)

Case cited and approved: *Woods v. Bonner*, 87 Tenn., 411, 414, 415.

2. **SAME.** Same. Not presumed from failure to pay taxes, or to take actual possession and to prevent casual trespasses, when. It cannot be presumed that a perfect title to granted land was abandoned from the owner's failure for thirty-five years to pay the taxes, or to take actual possession of the land and prevent casual trespasses, though such presumption might be indulged if the title was imperfect. (*Post*, p. 696.)

Cases cited and approved: *Hoffman v. Bell*, 61 Pa., 444; *Coal Co. v. Dewart*, 95 Pa., 72, 78; *Kreamer v. Vonelda*, 213 Pa., 74; *Doty v. Gillett*, 43 Mich., 203; *Barrett v. Coal Co.*, 70 Kan., 649; *Oil Co. v. Kimball* (Tex. Civ. App.), 114 S. W., 662.

FROM PUTNAM.

Appeal from the Chancery Court of Putnam County.
—D. L. LANSDEN, Chancellor.

Phy v. Hatfield.

B. G. ADCOCK, for complainant.

BOYD & PUCKETT, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

This is an ejectment suit brought by the complainant to recover eleven and one-half acres of land in Putnam county which he claims under a grant issued to him by the State on the 9th day of May, 1881. The defendants claim under a grant issued by the State to Celina Fisk on the 24th of September, 1827, and by a regular chain of conveyances from the heirs of Celina Fisk to J. Arnold, and from the latter to the defendants.

It is insisted by the complainant that this title was abandoned before Arnold procured deeds from the heirs of Celina Fisk. This contention is based on the fact that the evidence does not show that either Celina Fisk or her heirs ever paid any taxes on this land, or that they occupied it, and that the reason given by Mr. Arnold in his evidence for their failure to occupy it, or to pay any special attention to it, was that it was of little value. Mr. Arnold made this statement in giving a reason why various trespasses upon the land had been permitted to go unchecked before he purchased the land himself in 1885.

The contention of the complainant is that, inasmuch as the land was allowed to go unnoticed by its owners from 1827 to 1885, when the children of Celina Fisk made deeds, it must be treated as having been abandoned. It appears, however, that the grant was regis-

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tered in Jackson county on the 30th of November, 1850. This would indicate that between 1827 and 1850 the land was not forgotten, so that complainant's contention would have to be that the failure to pay taxes between 1850 and 1885, or to take actual possession of the land and prevent the incursion of casual trespassers, would amount to an abandonment. We do not think that this is a sound contention. Indeed, in order to justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. This was the substance of the decision of the court upon this point in *Woods v. Bonner*, 89 Tenn., 411, 414, 415, 18 S. W., 67. We also think the true view of the question is expressed in the following excerpt from *Bear Valley Coal Co. v. Dewart*, 95 Pa., 72, 78:

"An abandoned title is not transferred to an adverse claimant, or person who first seizes the land, but it falls back to the State, and by its extinction sometimes makes a younger and conflicting title good. The doctrine of abandonment does not apply to a perfect title, but only to imperfect titles. In favor of a junior warrant or settlement right after long lapse of time, an imperfect title by warrant and survey may be presumed to be abandoned. But such presumption cannot be made of a perfect title. That is never reinvested in the State on such principle. After the land has been located and patented, it will not fall back because it is a derelict, nor for the owner's neglect to pay the taxes. *Hoffman v. Bell*, 61 Pa., 444."

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To same effect, see *Kreamer v. Voneida*, 213 Pa., 74, 62 Atl., 518; *Doty v. Gillett*, 43 Mich., 203, 5 N. W., 89; *Barrett v. Kansas & T. Coal Co.*, 70 Kan., 649, 79 Pac., 150; *Houston Oil Co. v. Kimball*, (Tex. Civ. App.), 114 S. W., 662.

On the grounds above stated, we think the chancellor acted correctly in deciding that controversy in favor of the defendants and dismissing the complainant's bill. His decree is accordingly affirmed, with costs.

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MARCELLUS RHINEHART v. STATE.

(Nashville. December Term, 1909.)

1. **BILL OF EXCEPTIONS.** Time for preparing may be allowed not to exceed thirty days after the adjournment.

The former rule of law that a bill of exceptions filed after the close of the term at which the case was tried came too late and could not be considered as a part of the record was modified by statute (Acts 1899, ch. 275, sec. 1) authorizing the trial judge or chancellor, in his discretion, in all cases of appeal from trial courts to the supreme court, to allow the parties time in which to prepare a bill of exceptions, not to exceed thirty days after the adjournment. (*Post*, pp. 700, 701.)

Acts cited and construed: Acts 1899, ch. 275, sec. 1.

Cases cited and approved: *Clark v. Lary*, 3 Sneed, 77; *McGavock v. Puryear*, 6 Cold., 24; *Jones v. Burch*, 3 Lea, 747; *Sims v. State*, 4 Lea, 359; *Patterson v. Patterson*, 89 Tenn., 151; *Ballard v. Railroad*, 94 Tenn., 205; *Bettis v. State*, 103 Tenn., 339.

2. **SAME.** Same. Continuance of motion for new trial to the next term does not carry the whole case over into the next term so as to authorize thereat a bill of exceptions to be signed and filed; rule not changed by statute.

The continuance of a motion for a new trial from the trial term to the succeeding term of the court does not authorize the preparation and filing of a bill of exceptions within the extension of thirty days' time granted by the court upon overruling such motion at the next term. Such continuance of the motion for a new trial does not carry the whole case over into the next term so as to authorize thereat such extension of time, and the preparation, signing, and filing of a bill of exceptions within such extension. This rule is not affected or modified by a statute (Acts 1899, ch. 40) providing that whenever a case is pend-

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ing and on trial by court or jury, undetermined when the term expires, on account of time and the arrival of the succeeding term, the term shall be extended and continued into such succeeding term for all the purposes of trying, disposing of and returning verdict, and rendering judgment in such case so pending and on trial, the same as if such new term had not arrived. (*Post*, pp. 701-703.)

Acts cited and construed: Acts 1899, ch. 40.

Cases cited and distinguished: Railroad v. Simmons, 107 Tenn., 392; Ray v. State, 108 Tenn., 282.

FROM MONTGOMERY.

Appeal in error from the Criminal Court of Montgomery County.—C. W. TYLER, Judge.

F. G. GILBERT, J. E. JUSTICE, J. D. TYLER, and W. D. HOWSER, for Rhinehart.

ATTORNEY-GENERAL CATES, for State.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The plaintiff in error having been found guilty of murder in the first degree, in the killing of Rufus Hunter, has brought the record to this court for review. The trial took place at the June term, 1909, of the criminal court of Montgomery county, the jury returning their

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verdict on the 17th of July. On that day a motion for a new trial was entered, and on the 12th of August following a minute entry was made showing that the future hearing of this motion was continued until the next term of the court. On the following day, to wit, on the 13th day of August, there was a final adjournment of the June term of the court. The August term began on the 3d Monday of August, 1909, this being the 16th day of the month. The record shows that on August 19th the motion for a new trial was overruled, and 30 days were granted by the court for the preparation and filing of a bill of exceptions. Acting under this leave, the counsel for plaintiff in error prepared a paper purporting to be a bill of exceptions, which, being signed by the trial judge, was noted as filed on the 13th of September, 1909. Under these conditions, have we anything before us save the technical record? Can this paper, styled a "bill of exceptions," be treated as such by this court?

It was long the settled law of this State that a bill of exceptions filed after the close of the term at which the case was tried came too late and could not be considered a part of the record. *McGavock v. Puryear*, 6 Cold., 34; *Clark v. Lary*, 3 Sneed, 77; *Jones v. Burch*, 3 Lea., 747; *Sims v. State*, 4 Lea., 359; *Patterson v. Patterson*, 89 Tenn., 151, 14 S. W., 485; *Ballard v. Railroad*, 94 Tenn., 205, 28 S. W., 1088; *Bettis v. State*, 103 Tenn., 339, 52 S. W., 1071.

This rule was modified, however, by chapter 275 of the Session Acts of 1899, by the first section of which

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it was provided that in all cases of appeal from trial courts to the supreme court "the judge or chancellor may in his discretion allow the parties time in which to prepare a bill of exceptions, not to exceed thirty days after the adjournment." In the Bettis Case, *supra*, this court, recognizing the long-established rule and its modification by this statute, held that the bill of exceptions, filed after the expiration of the extension given by the trial judge, could not be used as a part of the record. In that case there was an affirmance of the judgment of the trial court, pronounced on a verdict of guilty of murder in the second degree, with punishment fixed at confinement in the penitentiary for a term of ten years.

It is insisted, however, that inasmuch as the motion for a new trial in the case at bar was continued from the trial term to the succeeding term of the court, this carried over the whole case, with the right to file a bill of exceptions within the extension granted by the court. This insistence is rested on chapter 40 of the Acts of 1899, as construed by this court in *Railroad v. Simmons*, 107 Tenn., 392, 64 S. W., 705, and *Ray v. State*, 108 Tenn., 282, 67 S. W., 553. This statute provides that, "whenever in the courts of this State any case is pending and on trial by court or jury undetermined at the time the term at which it is pending expires, on account of time and on account of the arrival of the succeeding term, the term shall be extended and continued into such succeeding term for all the purposes of trying, disposing of and returning verdict, and rendering judg-

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ment in such case so pending, and on trial the same as if such new term had not arrived." This statute was passed with no such case in view as we have here, nor does it fall within either its letter or spirit. The legislature, realizing the fact that, with increasingly crowded dockets in the lower court, a cause might be on trial when the day was reached for the adjournment of the court, with a view to the holding of a term of another court, over which the trial judge presided, to avoid the loss of time and labor consumed in such a trial, provided simply that such a cause might be projected into this succeeding term to be finally disposed of. The first of the above cases was tried in the circuit court of Madison county, and the motion for a new trial was made on October 12th, and there not being sufficient time to dispose of this motion it was held under advisement until October 16th, when it was overruled, the appeal prayed and granted, and thirty days allowed to file a bill of exceptions. Under the statute the fall term of the circuit court of Chester county began on the third Monday in October, which was October 15th. The insistence in this court was that the motion for a new trial having been disposed of, the appeal granted, and the extension given for filing a bill of exceptions, after the day on which the Chester circuit court should have convened, these various acts were *coram non judice*. This contention, however, was held to be unsound, and the case within the saving of the statute set out just above. In that case, however, unlike the present case, there

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was no final adjournment of the trial term, but simply a carrying over of the motion for a new trial beyond the day prescribed by law for the opening of the court in Chester county, and it was held that this was within the spirit of the statute. The same conditions, but more distinctly set out in the opinion, existed in *Ray v. State*, supra. Neither of these cases support the insistence of counsel for plaintiff in error.

Notwithstanding, under this holding, there is no bill of exceptions in the record, yet we have examined carefully the paper purporting to be such, and we have no doubt that the plaintiff in error, was guilty of the felony charged against him. The murder of Rufus Hunter, wanton, unprovoked, and unjustifiable, was a crime, not only against the law of the land, but against civilization as well.

It follows that the judgment of the lower court is affirmed.

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LOUIS BALDEN v. STATE.¹

(Nashville. December Term, 1909.)

1. **GRAND JURY.** Members may be selected from panel drawn and furnished by the jury commissioners, and may be designated by name by the judge of the criminal court of Davidson county.

The power of the judge of the criminal court of Davidson county, existing under the fourth section of Acts 1841-42, ch. 52, establishing said court, with the machinery necessary for such court, complete in all its details, to appoint, from the body of said county, thirty-seven qualified men to attend said court and serve as jurors, and to appoint a sufficient number of talesmen or veniremen to attend for jury service, was superseded, suspended, or made inoperative by Acts 1901, ch. 124, creating a board of jury commissioners for said county; and, by the fourth section, requiring the board to select a list of names of men to serve as jurors, whose names shall be put in a jury box; and, by the fifth section, requiring said jury commissioners to draw from the jury box the number required by law for the grand and petit juries for each term of the courts, because the later act is manifestly inconsistent with and repugnant to the earlier act in this particular; but the power of said judge under the said fourth section of the earlier act to designate by name thirteen qualified persons to serve as a grand jury, or to designate a larger panel, and from the same to select the required number of thirteen, is not superseded, suspended, or made inoperative by the fifth section of said later act requiring that from the said panel be drawn the grand and petit juries shall be made up, "as now provided by law," because there is no unavoidable inconsistency and repugnancy between the two acts in this particular. (*Post*, pp. 708-724.)

¹ For note on organization of grand jury, see *State, ex rel. Dunn, v. Noyes* (Wis.), 27 L. R. A., 776.

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Code cited and construed: Sec. 5327 (S.); sec. 4791 (M. & V.); secs. 4015, 4253 (T. & S. and 1858).

Acts cited and construed: Acts 1841-42, ch. 52, sec. 4; Acts 1901, ch. 124, secs. 1, 4, and 5.

Case cited and approved: Harris v. State, 100 Tenn., 289.

- 2. STATUTES.** Repeals by implication are not favored, and repugnancy must be irreconcilable to operate as a repeal by implication.

The repeal of statutes by implication is not favored, and the repugnancy between the older and later statutes must be plain, unavoidable, and irreconcilable, in order to operate as a repeal by implication. (*Post*, pp. 717, 718.)

Cases cited and approved: Fisher v. Baldrige, 91 Tenn., 420; Blaufield v. State, 103 Tenn., 600; McCampbell v. State, 116 Tenn., 105; Railroad v. Railway, 116 Tenn., 515; Carroll v. Griffith, 117 Tenn., 500; Railroad v. Byrne, 119 Tenn., 315.

- 3. SAME. Same.** Inconsistent statute embracing entire subject-matter of a prior statute renders it inoperative.

A statute inconsistent with, and embracing the entire subject-matter of, a prior statute, repeals it by implication, or, more accurately speaking, renders the prior statute inoperative during the life or existence of such later statute. (*Post*, pp. 718, 719.)

Cases cited and approved: Insurance Co. v. Taxing District, 4 Lea, 648; Poe v. State, 85 Tenn., 495; Terrell v. State, 86 Tenn., 523; Rodemer v. Mitchell, 90 Tenn., 65; State, ex rel., v. Butcher, 93 Tenn., 679; Chattanooga v. Neely, 97 Tenn., 527.

- 4. SAME. Same. Same.** Implied repeal operates only to the extent of the repugnance, where the later statute does not embrace all of the former statute, and does not substitute a new system.

It is well settled that where the later statute does not cover or embrace all of the provisions of the earlier one, and does not

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manifest a clear and unmistakable intention to provide and substitute a new system for the old, the provisions of the earlier act not clearly covered by the later one are unaffected and still in force, and the repeal operates only to the extent of the repugnance and conflict. (*Post*, p. 721.)

Cases cited and approved: *Cate v. State*, 3 Sneed, 120; *Hockaday v. Willson*, 1 Head, 114; *Frazier v. Railroad*, 88 Tenn., 163, 166; *Iron Co. v. Pace*, 89 Tenn., 707; *Durham v. State*, 89 Tenn., 730; *Bailey v. Drane*, 96 Tenn., 19.

5. GRAND JURY. Irregularity in judge's failure to compare names on slips with list does not invalidate action of grand jury, when.

The purpose of the jury commissioners statute (Acts 1901, ch. 124, sec. 5), in providing that the judge shall first compare the lists contained in the jury commissioners' report, which is filed with the clerk of the court, with the names on the slips delivered in court by the chairman of the board, which, if they correspond, shall constitute the panel of grand and petit jurors for the term, is to enable the court to see that the list reported to it and summoned corresponds with the names on the slips; and where there is no averment and showing that the names did not so correspond, the accused cannot avail himself of the irregularity in the failure of the judge to compare the list with the names on the slips, so as to affect the composition and action of the grand jury, especially since the statute provides, in its 17th section, that, in the absence of fraud, no irregularity with respect to the provisions of the act shall affect the validity of any action of a grand jury, if the act has been substantially complied with. (*Post*, pp. 725, 726.)

Acts cited and construed: Acts 1901, ch. 124, secs. 5 and 17.

6. JURY COMMISSIONERS LAW. Presumption that report was filed and properly indorsed, in absence of averment to contrary.

It must be assumed that the report of the jury commissioners was filed in the office of the clerk of the court and properly in-

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dorsed as required by the statute, in the absence of averment and showing to the contrary. (*Post*, p. 726.)

Acts cited and construed: Acts 1901, ch. 124, sec. 5.

- 7. SAME.** Same. Failure to spread report on minutes is a mere irregularity not prejudicial to accused.

The report of the jury commissioners giving the names of the panel of jurors for the term, when filed in the office of the clerk of the court and properly indorsed by him as required by the statute, becomes a record of the court, and the mere fact that it was not spread upon the minutes of the court is a mere irregularity which could not in any wise prejudice the accused. (*Post*, p. 726.)

Acts cited and construed: Acts 1901, ch. 124, sec. 5.

- 8. GRAND JURY.** Irregularity in court order upon jury commissioners for excessive number of jurors does not affect validity of action of grand jury.

A court order directing the jury commissioners to furnish the court five hundred names from which to select the grand and petit juries for the ensuing term substantially complies with Acts 1901, ch. 124, sec. 5, requiring the court, by order on the minutes, to designate the number of juries and additional and extra jurors who shall be in attendance on the court, since the number of jurors is fixed by law, and it is a mere matter of calculation to determine how many jurors and additional and extra jurors are included in the order, so that any irregularity was cured by section 17 of said act, providing that, in the absence of fraud, no irregularity as to the provisions of the act shall affect the validity of any action of the grand jury, if the act has been substantially complied with. (*Post*, pp. 726, 727.)

Acts cited and construed: Acts 1901, ch. 124, secs. 5 and 17.

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FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County.—W. M. HART, Judge.

JAMES B. NEWMAN and J. H. ZARECOR, for Balden.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the criminal court of Davidson county for the larceny of a pistol, of the value of fifteen dollars. He filed his plea in abatement, which was demurred to by the State. The demurrer was sustained, and the plea in abatement was accordingly disallowed. The case was thereupon tried on its merits, and the plaintiff in error was found guilty of petit larceny, and sentenced to one day's confinement in the county workhouse. He filed his motion for new trial, which was overruled. He thereupon appealed to this court, and has here assigned errors.

The errors assigned are upon the action of the trial judge in sustaining the demurrer to the plea in abatement. This plea was filed in due time, and presented the following objections to the indictment:

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"First. Because the thirteen members constituting the grand jury which found the alleged indictment in this case were appointed by the judge of the criminal court of Davidson county, Tennessee, and not drawn from a box or other suitable receptacle by a child under ten years of age, as required by law.

"Second. Because the thirteen members constituting the grand jury which found and returned the alleged indictment in this case, to wit, B. F. Cook, W. J. Booth, J. M. Lanier, George Enhaus, John Woods, J. L. Carney, J. C. Baker, E. B. Parkerson, R. P. Hutton, John Bosworth, W. H. Blair, N. B. Hitt, and Everett Creech, were appointed by the judge of the criminal court of Davidson county from the panel of grand and petit jurors, consisting of five hundred names drawn by the jury commissioners of said county from the jury box for the January term, 1910, of said court, pursuant to an order entered in Minute Book 3, page 40, of said criminal court, by the judge thereof, and filed with the clerk of said court, who duly had summoned all of said five hundred persons so drawn to be present on the first day of said term. Said panel of five hundred jurors was regularly summoned by the sheriff of said county, and in attendance on the first day of said term of said court, and said judge from said panel of five hundred jurors appointed said thirteen men as the grand jury for said term, without directing the names of all said jurors—five hundred—in attendance to be written on scrolls and placed in a box or other suitable receptacle, and

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the first thirteen drawn out by a child under ten years of age, to be the grand jury for said term.

"Third. Because the rule or order under and by which said panel of grand and petit jury was drawn from the jury box by the jury commissioners, entered by said judge in Minute Book 3, page 40, of said criminal court, in words and figures as follows: 'Order of Court. It is ordered by the court that the jury commissioners of Davidson county, Tennessee, furnish this court with five hundred names from which to select the grand and petit jury for the ensuing January term, 1910, which convenes first Monday in January, 1910,' does not designate the number of juries and additional and extra jurors who shall be in attendance at the January term of said court, as required by law.

"Fourth. Because the slips or scrolls upon which were written the five hundred names taken from the jury box by the board of jury commissioners for the January term, 1910, of said court, were not placed in a sealed envelope, safely kept, and delivered by the chairman of said board in open court to the judge of said court on the first day of said term, and the said judge failed to compare the list contained in the report filed by the jury commissioners with the clerk of said court with the names on the slips or scrolls delivered in open court by the chairman of the board of jury commissioners, to ascertain if they were the same, and said report so filed with the clerk was never spread upon the minutes of said court."

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The grounds of demurrer were, first, that the facts set out in the plea were insufficient in law to abate the indictment; and, secondly, that these facts show that the grand jury was organized as provided by law.

The controversy arises out of the fact that by chapter 52, Acts 1841-42, there was established a criminal court for Davidson county, which contained, in section 4, a peculiar provision as to the selection of grand and petit juries. That section is as follows:

“That the judge of said court shall from time to time appoint a grand jury and two petit juries to attend said court at its respective regular and special terms, and the said jury and the witnesses who shall attend said court, shall be entitled to the same compensation, and be subject to the same rules and regulations, and possess the same qualifications, as now provided by law in regard to jurors and witnesses in the circuit court.”

The same provision was carried into the Code of 1858 as to the said court, and is found in section 4253 of that publication.

The method of selecting grand juries in criminal courts generally and in circuit courts having criminal business is thus laid down in section 4015 of the Code of 1858 (Shannon's Code, section 5827: “To form the grand jury, the court shall direct the names of the jurors in attendance to be written on scrolls, and placed in a box or other suitable receptacle and drawn out by a child under ten years of age, and the thirteen jurors

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whose names are first drawn shall be a grand jury for the term."

It is insisted by counsel for plaintiff in error that section 4, Acts 1841-42, above mentioned, was repealed by necessary implication by chapter 124, Acts 1901. On the other hand, it is contended by counsel for the State that section 4 referred to was repealed only so far as it was in necessary conflict with the act of 1901.

In order to a proper understanding of the question, it is necessary to state that section 4, Acts 1841-42, was construed by this court, in the case of *Harris v. State*, at the December term, 1897, reported in 100 Tenn., at page 289, 45 S. W., 438.

It appears from that case that Harris appealed to this court from a death sentence for the crime of murder imposed by the criminal court of Davidson county. One of the matters assigned as error was that the judge of the criminal court had selected and appointed the grand jury. The court held that under the statute in question "it was entirely competent for the judge of the criminal court of Davidson county to designate by name thirteen qualified persons to serve as a grand jury, or he could designate a larger panel, and from them select the required number of thirteen." It should be noted that in the body of the opinion the court in terms, by an evident slip of the pen, refers to Acts 1853-54, c. 13, as the act creating the criminal court of Davidson county. The latter is an act creating the criminal court of Shelby county, and section 5 of that act

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is an exact copy of section 4 of the Act of 1841-42, which creates the criminal court of Davidson county. This clerical error, therefore, does not affect the force of the holding of the court.

It may be considered as settled, therefore, that at the time of the passage of Acts 1901, c. 124, it was "provided by law" that in the criminal court of Davidson county the grand jury should be appointed by the judge of that court; that is to say, it was competent for the judge to designate by name thirteen men who should constitute the grand jury.

Chapter 124, Acts 1901, which it is insisted repeals by implication the Act of 1841-42, is entitled:

"An act to create a board of jury commissioners for each county in this State having a population of one hundred and twenty thousand inhabitants or over, under the federal census of 1900, or any subsequent federal census, and for the selection of juries, to prescribe the duties of the members of said board and of the judges, and to punish violations of this act; to provide for jury lists and jury boxes to be kept in each county of this State; and to repeal all laws in conflict with this act."

On the population basis indicated in this title, the act, at the time it was passed, could apply only to Davidson and Shelby counties.

Section 1 of the act provides that there shall be a board of jury commissioners for each county, consisting of three discreet persons, who are householders and

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freeholders of the county, and who are not practicing attorneys at law or State or county officers, who have no suit pending in said court at the time of their appointment, and not more than two of whom shall belong to the same political party, "to be appointed by the circuit judge who holds court in said county, and in case there is more than one circuit judge or a judge holding the criminal court, or a chancellor or other judge whose duty it shall be to hold the circuit court or criminal court, then by such judges holding circuit or criminal courts, and if more than one such judge, by all jointly."

Section 2 sets out the oath to be taken by the commissioners.

Section 3 prescribes the details of the organization of the board and declares that the clerk of the circuit court shall be the clerk of the board of jury commissioners.

Section 4 provides:

"It shall be the duty of said jury commissioners to select from the tax books of the county and other sources, names of upright and intelligent men, known for their integrity, fair character and sound judgment, from each and every district in the county, and in proportion to the population of such districts, as near as may be, and possessing the qualifications now prescribed by law, except that service on a regular panel within two years shall not disqualify a person, a list of names numbering not less than one-fifth the whole number of votes cast in the county for presidential

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electors at the presidential election next preceding the making of said list; provided, said list for any one county [shall not] contain more than four thousand names, nor less than two hundred and fifty names. Said list shall constitute the jury list for two years from the making thereof, and shall not, during said years, be added to or taken from, except as hereinafter provided."

The residue of section 4 relates to the keeping of record books as a jury list for the county, the placing of each and all the names of the persons thus selected written on slips or scrolls of paper in a box securely locked under seal, and to the compensation of the clerk of the circuit court for his services as clerk of the jury commissioners.

Section 5 provides:

"That not less than ten days nor more than fifteen days before each regular or special term of the circuit court or criminal court, said board shall unlock the jury box and break the seal thereof, and, after having well shaken the same, cause to be drawn therefrom in the presence of the board, by a child under the [ten] years of age, a number of names equal to the number of jurors, who, under existing laws, are selected by the county court, and the judge of the circuit court or criminal court, or the number designated by order of the court as hereinafter provided, to constitute the regular panel of grand and petit jurors for such terms of court.
... When in this way the required number of

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names have been drawn, the slips or scrolls on which they have been written shall be placed in a sealed envelope and safely kept by the chairman of the board, and by him delivered in open court to the judge of the court on the first day of the term."

Then follows in this section a form of the report to be made by the jury commissioners to the court of the panel thus drawn. After this the section proceeds as follows:

"The report shall be delivered to the clerk of the circuit or criminal court, according to the court for which said panel has been drawn, and by him filed in his office, and the date of such filing endorsed thereon. Thereafter, and at least five days before the next regular or special term of such court, the clerk of the court shall issue to the sheriff a writ of *venire facias*, commanding him to summons the persons whose names are set out in said report as the jurors for said term of court, and it shall be the duty of the sheriff to serve same as now provided. At such regular or special term of the court the judge thereof shall first compare the list contained in the report filed with the clerk with the names on the slips or scrolls delivered in open court by the chairman of the board, and if they correspond, they shall constitute the panel of grand and petit jurors for that term of the court, and said report shall be spread upon the minutes of the court. From this panel the grand and petit jurors shall be made up, as now provided by law, examining each proposed juror to ascertain whether he is qualified. . . ."

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The act contains a number of other sections relating to the details of the duties of the jury commissioners, the clerk of the board, and other matters that do not call for special mention.

From an inspection of the act it will be seen that its provisions are exhausted when a panel of veniremen is presented to the court. The act provides that "from this panel the grand and petit juries shall be made up as now provided by law." The question is, what law is here referred to? The plaintiff in error insists that the reference is to Shannon's Code, section 5827, already quoted, to the effect that it is the duty of the court to direct the names of the jurors in attendance to be written on scrolls, and placed in a box or other suitable receptacle, and drawn out by a child under ten years of age, and that the thirteen jurors whose names are first drawn shall be a grand jury for the term. The State insists that out of this panel the judge shall himself select the grand jury under the provisions of section 4 of the Act of 1841-42.

As already indicated, counsel for plaintiff in error insists that this section was repealed by the above-mentioned Acts 1901, c. 124.

The law upon this subject is thus stated in recent cases decided by this court:

"It is a familiar and universal rule that repeals of statutes by implication are not favored. The repugnancy between the two statutes must be very plain and unavoidable. Both the terms and the necessary opera-

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tion of the two acts must be incapable of reconciliation before the older act will be repealed by the later one, for the reason that statutes are only held to be repealed by implication because it cannot be supposed that the lawmaking power intended to enforce laws which are contradictions." *Blaufeld v. State*, 103 Tenn., 600, 53 S. W., 1092. "Repeals by implication are not favored, and a later act will not be held to thus repeal a former one upon the same subject, unless the two are absolutely repugnant and in irreconcilable conflict. Nothing short of this can have that effect." *Railroad v. Byrne*, 119 Tenn., 315, 104 S. W., 469. "An act will never be held to repeal by implication another act, unless it clearly appears that the two acts cannot stand together. The repugnancy between the two acts must be plain and unavoidable." *Railroad v. Railway*, 116 Tenn., 515, 95 S. W., 1023. To same effect, *Fisher v. Baldrige*, 7 Pickle, 420, 19 S. W., 227; *McCampbell v. State*, 116 Tenn., 105, 93 S. W., 100; *Carroll v. Griffith*, 117 Tenn., 500, 97 S. W., 66; Lewis' *Sutherland, Statutory Construction* (2 Ed.), vol. 1, sec. 247.

Counsel for plaintiff in error rely upon the rule that a statute inconsistent with, and embracing the entire subject-matter of, a former statute, repeals it by implication. This rule is well settled. *Poe v. State*, 1 Pickle, 495, 3 S. W., 658; *Terrell v. State*, 2 Pickle, 523, 8 S. W., 212; *Rodemer v. Mitchell*, 6 Pickle, 65, 15 S. W., 1067; *State, ex rel., v. Butcher*, 9 Pickle, 679, 28 S. W., 296; *Chattanooga v. Neely*, 13 Pickle, 527, 37 S.

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W., 281. This rule does not rest upon the theory that the later statute actually repeals the earlier one, but upon the principle that, there being a conflict between the two acts and their provisions being inconsistent and repugnant, one or the other must give way and remain inoperative during the life of the other.

In the case of *Home Insurance Co. v. Taxing District*, 4 Lea, 648, Mr. Justice Cooper, speaking to this question, said: "Strictly speaking, the new statute does not repeal the old statute, however inconsistent with it. It is a mere form of expressing the result to say that the one repeals the other by implication. The prior act is not repealed, but rendered inoperative, and this is made plain by the fact that a direct repeal of the later act, without any reference to the former, will, by a rule of the common law, give efficacy to the former. It was precisely because the old act never was repealed that it thereby became operative. It is a convenient though inaccurate, use of language to say that the new law repeals the old, and that the repeal of the new law revives the old. More properly, the new act is an obstacle to the operation of the old act, which obstacle is removed by its repeal."

But it is not insisted in behalf of plaintiff in error that the act of 1901 embraces the entire subject-matter of, and repeals, chapter 52, Acts 1841-42.

The latter act is entitled: "An act to establish a criminal court in the county of Davidson." It contains thirteen sections, and provides all the officers and

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machinery necessary to the operation of the court for the trial of criminal cases.

Section 1 provides: "That from and after the passage of this act, a court shall be established in the county of Davidson, for the trial of all crimes and offenses against the laws now in force in this State, and such as may be hereafter enacted, to be composed of one judge, to be elected by the legislature, to hold his office eight years, to reside within said county, and to receive, as a compensation for his services, an annual salary of \$1,000.00."

Section 2 fixes the times for holding the court. Section 3 directs that the attorney-general from the Sixth judicial circuit, the clerk of the circuit court, and the sheriff of Davidson county shall attend said criminal court and perform all the duties now by law required of them, respectively, in relation to the criminal business of the circuit court of Davidson county, and shall, respectively, receive the same fee and compensation therefor. Section 4 relates to the selection of a grand jury and two petit juries to attend the court, and has already been quoted in full. Section 5 provides for the transfer of the records, etc., in criminal cases pending in the circuit court to said criminal court. Section 6 confers upon the said criminal court the same jurisdiction in criminal cases "now held by the circuit court of Davidson county." Section 7 provides for appeals and writs of error to the supreme court. The remaining sections of the act, except section 11, per-

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tain to the duties of the officers of the said court. Section 11 repeals all laws giving criminal jurisdiction to the circuit court of Davidson county.

It is thus perceived that the act in question establishes a criminal court in Davidson county, with the machinery necessary for such court, complete in all its details. It is certainly true that the act of 1901 does not in any way or manner conflict with any part of twelve of the thirteen sections of said act of 1841-42, and therefore that this case does not fall within the class of cases above referred to, wherein a later statute works a repeal of an earlier one, because it embraces new provisions covering the entire subject-matter of the former statute.

It is well settled that where the later statute does not cover or embrace all of the provisions of the earlier one, and does not manifest a clear and unmistakable intention to provide and substitute a new system for the old, the provisions of the earlier act not clearly covered by the later one are unaffected and still in force, and the repeal operates only to the extent of the repugnance and conflict. *Durham v. State*, 5 Pickle, 730, 18 S. W., 74; *Cate v. State*, 3 Sneed, 120; *Frazier v. Railroad Co.*, 4 Pickle, 163, 166, 12 S. W., 537; *Hockaday v. Wilson*, 1 Head, 114; *Bailey v. Drane*, 12 Pickle, 19, 33 S. W., 573; *Iron Co. v. Pace*, 5 Pickle, 707, 15 S. W., 1077.

It therefore becomes necessary to inquire wherein the act of 1901 conflicts with the act of 1841-42. The only

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provisions of the latter act which can possibly be considered repugnant to the act of 1901 are those found in section 4 of the former act, with reference to the appointment of juries. The act of 1841-42, as construed in *Harris v. State*, supra, authorized and empowered the judge of the criminal court to appoint thirty-seven men from the body of the county of Davidson to attend the criminal court and serve as jurors. In addition to the power to appoint a sufficient number of talesmen or veniremen to attend for jury service, he was further authorized and empowered to designate by name from the venire thus appointed and summoned thirteen qualified persons to serve as a grand jury.

To what extent are the provisions of the Act of 1901 inconsistent with and repugnant to the exercise by the judge of the criminal court of the powers thus conferred? Manifestly the provisions of this act are inconsistent with the power of the judge of the criminal court to appoint a panel from the body of the county to attend the criminal court for jury service, because the act provides that the panels from which jurors are to be selected in the criminal and circuit courts shall be drawn from the jury box by the jury commissioners. This necessarily operates to deprive the judge of that power. The venire, or panel, is now in court. How shall the juries be made up? It is necessary to proceed by some method to select or designate thirteen members of the panel to act as grand jurors and others to act as petit jurors. The act of 1901 contains no sug-

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gestion of the particular method to be followed in this matter. It simply provides that "from this panel the grand and petit juries shall be made up, as now provided by law." The method provided by law is found in the act of 1841-42, and that method is still the lawful one, because neither the act of 1901, nor any other act, provides a different method. No provision of the act of 1901 has been indicated by counsel or discovered by the court which is inconsistent with or repugnant to the exercise of this power by the judge of the criminal court. In the brief of counsel for plaintiff in error certain particulars are pointed out wherein the two acts are in conflict; but in every instance the conflict relates to the matter of drawing the entire panel from the body of the county, and has no reference to the designation or selection of the particular members of the panel who shall serve on the grand jury, and those who shall serve on the petit juries. An examination of the act of 1901 discloses that each and every provision of that act may be complied with in every detail, and yet the court will be left with an unorganized venire or panel—with the grand jury and the petit juries not "made up." How, therefore, can it be reasonably insisted that there is an unavoidable inconsistency and repugnancy between the act of 1901 and the act of 1841-42, in so far as the latter act directed the judge of the criminal court to designate the members of the panel, who should serve on the grand jury and those who should serve on the petit jury.

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It is true that the act of 1841-42 does not in terms separate the process of obtaining juries into two steps or stages; that is to say, it does not set out, first, that the judge shall appoint from the body of the county a venire or panel to attend his court for jury service, and then by an additional provision provide that the judge may designate the particular members of the panel to serve on the grand jury and petit jury, but such is the effect of the language used in the act as construed in *Harris v. State*, supra. It is only in respect of the right of the judge to take the first step, as above indicated, that the provisions of the act of 1841-42 are superseded by the act of 1901. A study of the caption of the record in the case at bar discloses a practical demonstration of the fact that there is no conflict in the operation of the two statutes in question as they are construed and applied by the judge of the criminal court. The record shows that the panel from which the juries were selected was brought to the bar of the court under the provisions of the act of 1901, and when the panel was thus in court, and all the provisions of the act of 1901 exhausted, the grand jury was yet to be organized. It was, therefore, the duty of the judge to appoint the grand jury "as provided by law," to wit, the act of 1841-42.

Certain other irregularities in the matter of the selection of the grand jury, and the petit jury as well, are averred in the plea of abatement and noted supra.

Taking up these objections in the most convenient order, they are:

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First, that "the slips or scrolls upon which were written the five hundred names taken from the jury box by the board of jury commissioners for the January term, 1910, of said court, were not placed in a sealed envelope, safely kept, and delivered by the chairman of said board in open court to the judge of said court on the first day of said term, and the said judge failed to compare the list contained in the report filed by the jury commissioners with the clerk of said court, with the names on the slips or scrolls delivered in open court by the chairman of the board of jury commissioners, to ascertain if they were the same, and said report so filed by the clerk was never spread upon the minutes of said court."

The act of 1901 (section 5) provides that, when the names of the panel for the term have been drawn from the box by the jury commissioners, the slips or scrolls on which the names are written shall be placed in a sealed envelope, and delivered by the chairman of the board in open court to the judge of the court on the first day of the term. It is further provided that the judge shall first compare the list contained in the report, which the statute also requires the commissioner to file with the clerk, with the names on the slips or scrolls delivered in open court by the chairman of the board, and if they correspond they shall constitute the panel of grand and petit jurors for that term of the court, and said report shall be spread upon the minutes of the court.

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It is manifest that these latter requirements are provided in order that it may be seen by the court that the list reported to the court and summoned by the sheriff corresponds with the names drawn from the box as shown by the slips or scrolls. There is no averment in the plea that the names in the list did not correspond and this averment, we think, is necessary, before the plaintiff in error could avail himself of the irregularity.

There are two provisions in section 5 of the act of 1901 with reference to the report of the jury commissioners. The first is that "the report shall be delivered to the clerk of the circuit or criminal court, according to the court for which said panel has been drawn, and by him filed in his office, and the date of such filing endorsed thereon." And later on in said section it is provided that "said report shall be spread upon the minutes of the court."

It is not averred in the plea that the report was not duly filed in the office of the clerk and such filing indorsed thereon. It must be assumed, therefore, that it was so filed and became a record of the court, and the mere fact that it had not been spread on the minutes is also a mere irregularity, which could not in any wise prejudice plaintiff in error.

Again it is averred in the plea that the rule or order under and by which said panel of grand and petit juries was drawn from the jury box by the jury commissioners and entered by the judge in the minute book of the criminal court does not designate the number of juries

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and additional and extra jurors who shall be in attendance at the January term of said court, as required by law, but that the order simply directed the jury commissioners to furnish the court with five hundred names from which to select the grand and petit juries for the then ensuing January term, 1910.

This latter objection is not tenable. The act does provide that the court shall by order on the minutes, "designate the number of juries and additional and extra jurors" who shall be in attendance on the court; but the order in the present case is a substantial compliance with this provision of the statute, because no other number than thirteen is recognized as a grand jury, and no other number than twelve is recognized as a petit jury, by the laws of Tennessee, and it is a mere matter of calculation to determine how many juries and additional and extra jurors are included in the five hundred names.

These latter irregularities are cured by section 17 of the act, which provides "that in the absence of fraud, no irregularity with respect to the provisions of this act shall affect the validity of any action of a grand jury, if this act has been substantially complied with, or the validity of any verdict rendered by a trial jury, unless such irregularity has been specially pointed out and exception taken thereto before the jury is sworn."

No objection was made to the trial jury in the case at bar on any ground. There is no averment of fraud in respect of the grand jury.

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On the grounds stated, we are of the opinion that there was no error in the action of the trial judge in sustaining the demurrer; and, no error being pointed out as having occurred in the trial of the case before the jury, we are of the opinion that the judgment of the court below must be in all things affirmed.

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GEORGE BISHOP v. STATE

(Nashville. December Term, 1909.)

1. **QUARANTINE REGULATIONS.** Rule preventing noninfected as well as infected domestic animals from running at large that is within the statute, and reasonable.

Under a statute (Acts 1901, ch. 156, sec. 7) conferring upon the commissioner of agriculture and the State live stock inspector general supervision over all communicable diseases among domestic animals, and empowering them to make and enforce such rules and regulations against the spread and for the prevention and suppression of diseases as in their judgment may seem necessary and proper, a rule or regulation made or adopted by them, which prevents healthy cows as well as infected cows from running at large, is within the statute, and is a reasonable exercise of the power granted. (*Post*, pp. 731-734, 739, 740.)

Act cited and construed: Acts 1901, ch. 156, sec. 7.

2. **SAME.** Same. Sufficiency of indictment for violation of quarantine rules adopted and promulgated by officers.

An indictment under the statute (Acts 1901, ch. 156) for the suppression and prevention of the spread of communicable diseases among domestic animals, charging that the defendant did violate the quarantine rules adopted, established, and promulgated by the commissioner of agriculture, and State live stock inspector, under the authority of said statute, by allowing two cows owned or controlled by him to run at large, etc., without the required permission of a duly authorized inspector, shows, with sufficient clearness, what quarantine rules and regulations were violated by the defendant, and in what particulars they were violated. (*Post*, pp. 734, 735.)

Code cited and construed: Sec. 7077 (S.); sec. 5943 (M. & V.); sec. 5114 (T. & S. and 1858).

Acts cited and construed: Acts 1901, ch. 156.

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3. SAME. Same. Evidence held sufficient to sustain verdict and conviction for violation.

The evidence is stated and held to be sufficient to sustain a verdict of guilty and judgment of conviction under an indictment for the violation of a regulation made and promulgated under the statute (Acts 1901, ch. 156) for the prevention and suppressing of communicable diseases among domestic animals, in that defendant permitted two cows to run at large without the required permission. (*Post*, pp. 735-738.)

Acts cited and construed: Acts 1901, ch. 156.

4. SAME. Same. Question of reasonableness is one for the court, and not for the jury.

The question of the reasonableness or unreasonableness of a rule or regulation, made and promulgated under the statute (Acts 1901, ch. 156) for the suppression and prevention of the spread of communicable diseases among domestic animals, is one for the court, and not for the jury. (*Post*, pp. 738, 739.)

Acts cited and construed: Acts 1901, ch. 156, sec. 7.

Cases cited and approved: *Commonwealth v. Worcester*, 3 Pick. (Mass.), 462; *Hawes v. Chicago*, 158 Ill., 653; *State v. Boardman*, 93 Me., 73; *Austin v. Cemetery*, 87 Tex., 330; *State v. Jersey City*, 37 N. J. Law, 348.

5. SAME. Reasonableness is not to be tested by extreme illustrations and supposed cases; case of a reasonable rule.

The reasonableness of a rule or regulation, adopted and promulgated under the statute (Acts 1901, ch. 156) for the suppression and prevention of the spread of communicable diseases among domestic animals, is not to be tested by its application to extreme illustrations, nor by supposed extreme cases altogether foreign to the facts of the case at bar, and the rule or regulation adopted and promulgated, as shown in the first headnote, is reasonable, and within the power conferred by said statute, and is, therefore, valid. (*Post*, pp. 739, 740.)

Acts cited and construed: Acts 1901, ch. 156.

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FROM LINCOLN.

Appeal in error from the Circuit Court of Lincoln County.—JOS. C. HIGGINS, Judge.

J. E. ROUTT and HOLMAN & HOLMAN, for Bishop.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

The plaintiff in error, George Bishop, has appealed from a judgment of the circuit court of Lincoln county imposing upon him a fine of fifty dollars and the payment of the costs of the case for a violation of the quarantine rules and regulations adopted and promulgated by the commissioner of agriculture and State live stock inspector to prevent and restrict the spread of communicable and infectious diseases among domestic animals in this State.

The first question arises upon a demurrer to the indictment, which was overruled by the trial judge, and his action in that respect is assigned as error.

The indictment is predicated upon chapter 156 of the Session Acts of 1901, and particularly upon sections 7

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and 8 of the act, together with certain of the rules and regulations adopted in pursuance thereof by the commissioner of agriculture and the State live stock inspector. This act is entitled "An act to prevent the spread of communicable diseases among domestic animals in the State of Tennessee, and to provide greater protection to the live stock industry of the State, and to provide penalties for the violation of this act, and to repeal chapter 424 of the Acts of 1899, and to amend chapter 46 of the Acts of 1897."

Section 7 provides: "That the commissioner of agriculture and the State live stock inspector shall have general supervision of all communicable diseases among domestic animals within, or that may be in transit through, the State, and they are empowered to establish quarantine against any animal or animals thus diseased, whether within or without the State, and may make such rules and regulations against the spread and for the suppression of said disease or diseases as in their judgment may seem necessary and proper; and in the enforcement of such rules and regulations they shall have the power to call on any one or more of the peace officers whose duty it shall be to give all the assistance in their power."

Section 8 provides: "That any person who willfully hinders, obstructs or otherwise disregards or evades such quarantine as they may declare, or violates any rule or regulation they shall make, in attempting to stamp out or restrict the spread of any disease or dis-

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eases aforementioned, or who shall resist any peace officer acting under them, or either of them, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, nor more than five hundred dollars, or imprisoned in the county jail for a period of three months, or both, at the discretion of the court."

The first ground of the demurrer interposed by the defendant below is that "it is not alleged in the indictment found against him in this case that the two cows owned by him, which it is alleged were permitted to run at large, or stray on the public roads, commons, and ranges of said county of Lincoln, were infected with any communicable or infectious diseases, or fever ticks, or other communicable disorder."

It is not necessary that the indictment should charge that the cattle which were permitted to run at large were infected with a communicable or infectious disease. The commissioner of agriculture and State live stock inspector are not limited by the statute to making rules which would prohibit live stock already diseased from running at large, but they are authorized and empowered by section 7, above quoted, to "make such rules and regulations against the spread and for the suppression of said disease or diseases as in their judgment may seem necessary and proper." It is manifest that a rule which went no further than to prohibit cattle which were already known to be afflicted with communicable or infectious diseases from running at

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large would be comparatively valueless in the way of preventing the spread of such diseases.

The second and last ground of the demurrer is that "it is not shown in the said indictment what quarantine rules and regulations alleged to have been adopted, established, and promulgated by the commissioner of agriculture and State live stock inspector of the State of Tennessee have been violated, evaded, or disregarded."

We think the indictment sufficient in the particulars indicated. The indictment (omitting formal caption) is as follows, *viz.*: "That George Bishop, heretofore, on the 23d day of April, 1909, in the county aforesaid, did willfully violate, evade, and disregard the quarantine rules and regulations adopted, established, and promulgated by the commissioner of agriculture and State live stock inspector of said State of Tennessee, enacted and promulgated by them under and by authority of the acts of the general assembly of said State of Tennessee to prevent and restrict the spread of communicable and infectious diseases among domestic animals in said State, by allowing two cows owned by him or under his control to run at large, or stray on the public roads, commons, and ranges of said county of Lincoln, the same being a county in said State of Tennessee, in which the work of tick eradication is being conducted, without first having obtained written permission for such privilege from a duly authorized inspector of said State, and against the peace and dignity of the State."

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Under the practice in this State many of the formalities and technical requirements of the common law in respect of indictments have been discarded. It is provided by statute that "the statement of facts constituting the offense in an indictment shall be in ordinary and concise language without prolixity or repetition." Shannon's Code, sec. 7077.

We think the indictment in this case shows, with sufficient clearness, the particulars wherein the defendant has willfully violated, evaded, and disregarded the quarantine rules and regulations adopted, established, and promulgated by the commissioner of agriculture and State live stock inspector, etc., in that he has allowed two cows owned by him to run at large or stray on the public roads, commons, and ranges of Lincoln county, the same being a county in Tennessee in which the work of tick eradication is being conducted, without first having obtained written permission from a duly authorized inspector of the State. The necessary effect of these averments is to charge that the defendant has violated that particular rule and regulation which prohibits cattle to run at large in the manner stated. The demurrer was properly overruled.

It is insisted on behalf of plaintiff in error that the evidence does not sustain the verdict of the jury. We think otherwise. In fact, the proof clearly establishes the guilt of the plaintiff in error. A pamphlet copy of the rules and regulations governing cattle quarantine in the State of Tennessee, duly proven to have been

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adopted and promulgated by the commissioner of agriculture and the State live stock inspector, and in force during the year of 1909, is found in the record. Section 1 of said rules and regulations is as follows: "The fact has been determined by the commissioner of agriculture and State live stock inspector, and notice is hereby given that a contagious and infectious disease known as splenetic, Southern, or Texas fever exists among cattle in counties and portions of counties situated south or below the following described line." Then follows the boundary of the quarantined territory, from which it appears that all that part of Lincoln county lying south of Elk river is included therein. Section 1 then concludes as follows, *viz.*: "Now, therefore, we, John Thompson, commissioner of agriculture, and W. H. Dunn, State live stock inspector, do hereby quarantine the area situated south and below the above described lines; and it is hereby ordered that cattle of the area south or below the said described line shall not at any time be transported, driven, or allowed to drift therefrom to any portion of Tennessee north or above the said line, except as hereinafter provided for immediate slaughter. Neither shall cattle of any county within the said area be transported, driven, or allowed to drift therefrom into any county within the said area wherein the work of tick eradication is being conducted, except after inspection and upon written permission issued by a duly authorized State inspector." Section 5 (the particular rule violated by the plaintiff in error) is as fol-

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lows, viz.: "No person, or persons, owning or having in charge any cattle, horses or mules, shall permit the same to run at large or stray on any public road, common or range in any county in this State in which the work of tick eradication is conducted, unless the owner shall first obtain written permission for such movement, or privilege, from a duly authorized inspector of this State. No person shall move, or cause to be moved, any cattle or other domestic animal in any manner from the farm, field or inclosure in which they are quarantined, to any other place, except on written permission from a duly authorized State inspector."

It appears, without serious controversy on the record, that the plaintiff in error willfully and knowingly permitted two cows owned by him to run at large on the public roads, commons, and ranges in that part of Lincoln county south of Elk river, on the 23d day of April, 1909 (the date set out in the indictment), and for a time theretofore and thereafter; that theretofore, to wit, on February 3, 1909, and again on March 13, 1909, notices had appeared in the *Lincoln County News*, a newspaper published at Fayetteville, in Lincoln county, and circulating throughout that county, warning cattle owners in Lincoln county south of Elk river that all cattle in that territory must "go off the range" and "go under fence" on and after April 1, 1909.

It also appears from the testimony of R. E. Koonce, live stock inspector for Lincoln county, that during the

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month of April, 1909, and prior to the 23d day of said month, he (Koonce) had a conversation with plaintiff in error concerning the rules and regulations governing cattle quarantine, and in the course of which conversation he produced and read to plaintiff in error a copy of said rules and regulations. Plaintiff in error admitted on the witness stand that he had the conversation detailed by Koonce.

The last assignment of error necessary to be noticed is based upon the refusal of the court below to give in charge to the jury a special request preferred by counsel for plaintiff in error, as follows, *viz.*: "The court charges that it is the insistence of the State in this case that a rule or regulation of the State live stock inspector and commissioner of agriculture has been violated in this case, which rule or regulation has been heretofore shown you in evidence. The court charges that the question of whether the rule in question is a reasonable one is a question of fact, for the determination of the jury under the evidence and the charge of the court."

The question of the reasonableness or unreasonableness of the rule or regulation of the agricultural department involved in this case was one for the court, and not for the jury to determine. The general rule is that the reasonableness of rules, regulations, or by-laws adopted and promulgated by officials or boards pursuant to authority delegated by the legislature is to be decided as a question of law, and that such by-law, rule, or regulation, if unreasonable, is to be held void as a

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matter of law; and it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the decision of a jury. Thompson on Trials, sec. 1057.

The same question, in principle, has been often before the courts in respect of the determination of the validity of ordinances of municipal corporations—whether they are reasonable or unreasonable. The authorities are practically unanimous in support of the rule that the question of whether an ordinance or by-law of a municipal corporation is reasonable is one of law for the court. Thompson on Trials, sec. 1056; McQuillin's Municipal Ordinances, sec. 185; *Com. v. Worcester*, 3 Pick. (Mass.), 462; *Haues v. Chicago*, 158 Ill., 653, 42 N. E., 373, 30 L. R. A., 225; *State v. Boardman*, 93 Me., 73, 44 Atl., 118, 46 L. R. A., 750; *City of Austin v. City Cemetery Ass'n*, 87 Tex., 330, 28 S. W., 528, 47 Am. St. Rep., 114; *State v. Jersey City*, 37 N. J. Law, 348.

The learned trial judge did not err in refusing to instruct the jury as requested.

It is earnestly insisted by the learned counsel for plaintiff in error that the "regulation" upon which this prosecution is predicated is unreasonable, and therefore void as a matter of law. In order to demonstrate the supposed unreasonableness of the regulation, counsel suppose an extreme case altogether foreign to the facts of the present case. We do not think that the reasonableness of any such rule or regulation is to be tested by its application to extreme illustrations. We have

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carefully considered the argument of counsel for plaintiff in error in support of the proposition that the regulations in question are unreasonable and we are unable to concur therein. Having due regard to the objects sought to be attained and the existing circumstances and contemporaneous conditions—all of which are proper to be considered—we think the rules and regulations adopted by the commissioner of agriculture and State live stock inspector, and involved in this case, are reasonable, and are within the powers conferred by the act of assembly, and therefore valid.

The judgment must be affirmed.

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